No. 4568

~~1445~~ United States 1442

Circuit Court of Appeals

For the Ninth Circuit.

GIUSEPPI CAMPANELLI,
Plaintiff in Error,

vs.

UNITED STATES OF AMERICA,
Defendant in Error.

Transcript of Record.

Upon Writ of Error to the Southern Division of the United States District Court of the Northern District of California, First Division.

Filmer Bros. Co. Print, 330 Jackson St., S. F., Cal.

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INDEX TO THE PRINTED TRANSCRIPT OF RECORD.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS OF RECORD.

For Defendant and Plaintiff in Error:
WILFORD H. TULLY, Esq., Phelan Bldg., San Francisco, California.

For Plaintiff and Defendant in Error:
UNITED STATES ATTORNEY, San Francisco.

In the Southern Division of the United States District Court, for the Northern District of California, First Division.

Before Hon. ROBERT S. BEAN, Judge.

No. 15,828.

UNITED STATES OF AMERICA,
Plaintiff,

vs.

J. O'HAGAN et al.,
Defendants.

PRAECIPE FOR TRANSCRIPT OF RECORD ON WRIT OF ERROR.

To the Clerk of said Court:

Sir: Please prepare certified transcript on writ of error of the following pleadings, papers and orders:

1st. Indictment.

2d. Verdict of jury.

3d. Demurrer of Defendant, Guiseppe Campinelli.
4th. Motion in arrest of judgment.
5th. Motion for new trial.
6th. Sentence and judgment.
7th. Bill of exceptions as settled by trial Judge.
8th. Petition for writ of error.
9th. Order allowing writ of error.
10th. Assignment of errors.
11th. Bond of costs and for appearance.
12th. Writ of error.
13th. Citation on writ of error.
14th. Praecipe for certified transcript.
15th. Stipulation and order omitting original exhibits. [1*]

Dated: April 6th, 1925.

WILFORD H. TULLY,
Attorney for Defendant, Guiseppe Campinelli, and Plaintiff in Error.

[Endorsed]: Filed Apr. 7, 1925. Walter B. Maling, Clerk. By C. M. Taylor, Deputy Clerk. [2]

In the Southern Division of the United States District Court, for the Northern District of California, First Division.

(INDICTMENT.)

At a stated term of said court begun and holden in the City and County of San Francisco within

*Page-number appearing at foot of page of original certified Transcript of Record.

and for the Southern Division of the Northern District of California on the first Monday in November, in the year of our Lord one thousand nine hundred and twenty-four,—

The grand jurors of the United States of America, within and for the Southern Division of the Northern District of California duly impaneled in and for the term of said court, begun and holden on the second Monday in July in the year one thousand nine hundred and twenty-four and duly and regularly continued in session by order of Court made and entered in the premises for the purpose of considering this and other cases, do on their oaths allege, find, charge and present:

I.

That heretofore, to wit, on the 28th day of October, 1919, the Congress of the United States of America passed an Act entitled: "An Act to prohibit intoxicating beverages and to regulate the manufacture, production, use and sale of highproof spirits for other than beverage purposes, and to insure an ample supply of alcohol and promote its use in scientific research and in the development of fuel, dye and other lawful industries, the short title of which Act is "National Prohibition Act," and which said Act at all of the times hereinafter mentioned was and now is in full force and effect.

II.

That heretofore, to wit, on the 21st day of September, 1922, the Congress of the United States of America [3] passed an Act entitled: "An Act to Provide Revenue, to regulate commerce with foreign

countries, to encourage the industries of the United States, and for other purposes," the short title of which Act is "Tariff Act of 1922," and which said Act at all of the times hereinafter mentioned was and is now in full force and effect.

III.

That by, under and pursuant to the provisions of said National Prohibition Act, and particularly by Section 3 of Title II thereof, it is provided:

> "No person shall on or after the date when the Eighteenth Amendment to the Constitution of the United States goes into effect, manufacture, sell, barter, transport, import, export, deliver, furnish or possess any intoxicating liquor except as authorized in this Act, and all the provisions of this Act shall be liberally construed to the end that the use of intoxicating liquor as a beverage may be prevented."

IV.

That by, under and pursuant to the provisions of said Tariff Act of 1922, and particularly by Section 593, Subdivision (b) thereof, it is provided:

> "If any person fraudulently or knowingly imports or brings into the United States, or assists in so doing, any merchandise, contrary to law, or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of such merchandise after importation, knowing the same to have been imported or brought into the United States contrary to law, such merchandise shall be forfeited and the offender shall be fined in any

sum not exceeding $5,000 nor less than $50, or be imprisoned for any time not exceeding two years, or both. Whenever, on trial for a violation of this section, the defendant is shown to have or to have had possession of such goods, such possession [4] shall be deemed evidence sufficient to authorize conviction, unless the defendant shall explain the possession to the satisfaction of the jury."

V.

That during all of the times herein mentioned the Farallone Islands were and now are owned and possessed by the United States; that said Farallone Islands are located at a point in the Pacific Ocean approximately due west of the city and county of San Francisco, State of California, United States of America, and at a distance approximately 25 miles from said city and county of San Francisco.

VI.

And the Grand Jurors aforesaid, on their oaths aforesaid, do further allege, charge, find and present:

That J. O'HAGAN, J. L. DANIEL, W. J. BLACKMORE, CRESENTINO C. A. MASSINO, *alias* J. MOSSINO, ANTONIO D. RILO, *alias* M. LASSELLE, JOSE ABELLON, *alias* F. ABALONE, MANUEL C. GONZALES, *alias* R. GONZALES, RAMIRO BASTERRECHEA REGUEIRO, *alias* R. BASTERRECECHE, J. BERMUDEZ, MANUEL SANCHEZ NOVO, *alias* M. SANCHEZ, AUGUSTUS RODNEY, GUISEPPE MANCARDI, *alias* GUISSEPPE BELLONIO,

ROBERT CASTAGNO, PATRICK J. WALSH, GUISSEPPE GERBANDO, F. JANOE, H. MIKE CUMMINGS, DANIEL HENDERSON, GUIVAN McMILLAN, J. LEONARD HOLMES, JOHN B. DeMARIA, GUISEPPE COMPANELLI, *alias* JOE CAMPANELLI, RICARDO COMPANELLI and RUTH ADELLE SMITH, *alias* PATRICIA HENDERSON, hereinafter called the defendants, and divers other persons to the grand jury and these grand jurors unknown, did at the Bay of San Francisco, within the District and Division aforesaid and within the jurisdiction of this court, an the 1st day of February, 1924, the real and exact date of which is to this grand jury and these grand jurors unknown, and continuously at all the times thereafter up to and including the date of the filing of this indictment, wilfully, [5] unlawfully, feloniously and knowingly conspire, combine, confederate and agree together and with divers other persons whose names are to these grand jurors and to this grand jury unknown, to commit certain offenses against the United States, that is to say:

(a) Wilfully, unlawfully, feloniously and knowingly to sell, transport, import, deliver, furnish and possess in the United States intoxicating liquor for beverage purposes, to wit, whiskey, wine, champagne, gin and beer containing one-half of one per centum and more of alcohol by volume and fit for use and intended for use for beverage purposes in the United States and within the jurisdiction of this court the said Acts to be then and there unlawful and prohibited and contrary to the pro-

visions of the Act of October 28, 1919, known as the "National Prohibition Act" and intended for use for beverage purposes in violation of said Act.

(b) Wilfully, unlawfully, feloniously, knowingly and fraudulently import and bring into the United States and within the jurisdiction of this court, assist in importing and bringing into the United States and within the jurisdiction of this court merchandise contrary to law, to wit, whiskey, champagne, wine, gin and beer containing one-half of one per centum and more of alcohol by volume and fit for use and intended for use for beverage purposes within the United States, the said acts to be then and there unlawful and prohibited and contrary to the provisions of Section 593, Subdivision (b) of the Tariff Act of 1922 and intended to be imported and brought into the said United States in violation of said Act.

VII.

And the grand jurors aforesaid, on their oaths, [6] aforesaid, do further allege, charge, find and present:

That said conspiracy, combination, confederation and agreement between the said defendants and said divers other persons whose names are as aforsaid to these grand jurors and this grand jury unknown, was continuously throughout all of the time from and after on or about the 1st day of February, 1924, and at all of the times thereafter and herein mentioned and referred to, and particularly at the time and times of the commission and consummation of each and all of the overt acts in this in-

dictment set forth and *up and* including the time of the filing of this indictment in existence and process of execution.

Against the peace and dignity of the United States of America, and contrary to the form of the statutes of the said United States of America in such case made and provided.

VIII.

And the grand jurors aforesaid, on their oaths aforesaid, do further allege, charge, find and present:

That in pursuance of said conspiracy, combination and agreement herein in this indictment set out and to effect and accomplish the object thereof and with the intent and for the purpose of effecting and accomplishing the objects thereof said defendants and each of them:

(a) Did at Havana, Cuba, in the month of July, 1924, cause the steamer "Giulia" to be loaded with about 12000 cases of intoxicating liquor, to wit, whiskey, champagne, wine, gin and beer containing one-half of one per centum of alcohol by volume and which was then and there fit for use and intended for use for beverage purposes, and did cause said steamer "Guilia" on or about the 7th day of July, 1924, to leave the port of Havana, Cuba, and proceed to a point opposite and within a distance of less than thirty miles from said Farallone Islands for the purpose and with the intent [7] of then and there unloading, selling, delivering, furnishing, transporting and importing and bringing into the United States and within the jurisdiction of this

court said cargo of intoxicating liquor, to wit, whiskey, champagne, wine, gin and beer which was then and there fit for use and intended for use for beverage purposes within the United States; that from and at said point said defendants did then and there wilfully, unlawfully and fraudulently unload, furnish and deliver from said vessel at said point a portion of said cargo of intoxicating liquors on to and upon motor boats "Nat" and divers other motor boats whose names and masters are to this grand jury and these grand jurors unknown, well knowing that said motor boats operated by their said masters would and did transport, deliver, import and bring into the United States, to wit, in San Francisco Bay and within the jurisdiction of this court said portion of said cargo of intoxicating liquor, to wit, whiskey, champagne, wine, gin and beer, then and there containing one-half of one per centum and more of alcohol by volume and fit for use and intended for use for beverage purposes in the United States and which said unloading, furnishing, delivering, transporting and importing and bringing into the United States of said intoxicating liquor by said defendants and on said motor boats as aforesaid, was then and there prohibited, unlawful and in violation of Section 3 of Title II of the Act of Congress of October 28, 1919, known as the National Prohibition Act, Subdivision (b) of Section 593 of the Tariff Act of 1922 and intended for use in violation of said Acts and each of them.

(b) That said defendants and each of them did on September 7, 1924, and while said steamer

"Giulia" was at [8] anchor opposite the said Farallone Islands, possess, load upon, deliver and furnish to the Motor boat "Nat" from said steamer "Giulia" intoxicating liquor, to wit, 300 cases containing 12 bottles each of intoxicating liquor, to wit, whiskey then and there containing one-half of one per centum and more of alcohol by volume which was then and there fit for use and intended for use for beverage purposes in the United States; and that said defendants did thereupon and upon said day cause said intoxicating liquor to be transported, imported and brought into the United States, to wit, into the San Francisco Bay and within the jurisdiction of this court upon and by means of said motor boat "Nat" and that the possession, loading, delivering, furnishing, transporting and bringing into the United States and within the jurisdiction of this court of said intoxicating liquor by said defendants at the time and in the manner aforesaid was then and there prohibited, unlawful and in violation of Section 3 of Title II of the Act of Congress of October 28, 1919, known as the National Prohibition Act and of subdivision (b) of Section 593 of the Tariff Act of 1922, and intended for use for beverage purposes in violation of said acts and each of them.

(c) That said defendants and each of them did between September 8, 1924, and October 8, 1924, and while said steamer "Giulia" was at anchor opposite the said Farallone Islands possess, load upon, deliver and furnish to the motor boat

"Shark" and the motor boat "Nat" from said steamer "Giulia" intoxicating liquor, to wit, 3,000 cases of whiskey, gin, wine, champagne and beer, then and there containing one-half of one per centum and more of alcohol by volume which was then and there fit for use and intended for use for beverage purposes within the United States; and that said defendants and each of them did thereupon and [9] during said time and by means of said motor boat "Shark" and said motor boat "Nat" transport, import and bring into the United States, to wit, into the San Francisco Bay and within the jurisdiction of this court said intoxicating liquor, and that the possession, loading, delivering, furnishing, transporting and bringing into the United States of said intoxicating liquor by said defendants at the time and in the manner aforesaid, was then and there prohibited, unlawful and in violation of Section 3 of Title II of the Act of Congress of October 28, 1919, known as the National Prohibition Act and of subdivision (b) of Section 593 of the Tariff Act of 1922, and intended for use for beverage purposes in violation of said Acts and each of them.

Against the peace and dignity of the United States of America and contrary to the form of the statute of the said United States of America in such case made and provided.

STERLING CARR,
United States Attorney.

[Endorsed]: A True Bill. Perry Eyre, Foreman. Presented in Open Court and Ordered Filed Nov. 12, 1924. Walter B. Maling, Clerk. By Lyle S. Morris, Deputy Clerk. [10]

At a stated term of the District Court of the United States of America for the Northern District of California, First Division, held at the courtroom thereof, in the City and County of San Francisco, on Monday, the 17th day of November, in the year of our Lord, one thousand nine hundred and twenty-four. Present: the Honorable JOHN S. PARTRIDGE, District Judge.

No. 15,828.

UNITED STATES OF AMERICA

vs.

GIUSEPPE COMPANELLI et al.

MINUTES OF COURT—NOVEMBER 17, 1924—ARRAIGNMENT.

Defendants Giuseppe Companelli and John B. de Maria were present with attorneys, each arraigned and thereupon, after hearing attorneys for defendants, ordered case continued to Nov. 19, 1924, for entry of said defendants' pleas to indictment.

Vol. 64, page 226. [11]

In the Southern Division of the United States District Court for the Northern District of California, First Division.

No. 15,828.

UNITED STATES OF AMERICA,
Plaintiff,

vs.

J. O'HAGAN et al*s.*,
Defendants.

DEMURRER OF DEFENDANT GUISEPPE CAMPANELLI TO INDICTMENT.

Now comes Guiseppe Campanelli, one of the defendants named herein, and demurs to the indictment on file herein and to each of the counts contained therein, and to the whole thereof, and for grounds of demurrer alleges:

I.

That each count of the indictment against him and the matters and things set forth in each of the several counts in the indictment herein, are not sufficient in law to compel the said defendant to answer to the indictment, in that it does not appear therein nor can it be ascertained therefrom.

(a) Of what crime, if any, the defendant herein is thereby charged;

(b) What statute of the United States, if any, the defendant herein has violated;

(c) Whether the above-named defendant at any

time, or at all, possessed, in the United States, intoxicating liquor for beverage purposes;

(d) Whether the above-named defendant willfully, unlawfully, feloniously, knowingly and fraudulently, import and bring into the United States and within the jurisdiction of this Court, certain merchandise contrary to law, as alleged [12] in subdivision "b" of paragraph VI of said indictment or whether he assisted in importing and *bring* into the United States and within the jurisdiction of the United States, merchandise contrary to law as alleged therein.

(e) Whether the said motor boats described in subdivision "a" of paragraph VIII of said indictment, actually did transport, deliver, import and bring into the United States, to wit, San Francisco Bay, and within the jurisdiction of this Court said portion of said cargo of intoxicating liquor;

(f) How, or in what manner, the above-named defendant, Guiseppe Campanelli, did conspire, combine, confederate and agree together with others to perform the alleged unlawful acts.

II.

The facts stated in the indictment do not constitute an offense under the laws of the United States.

III.

That there is no sufficient showing in the said indictment of unlawful means used by the above-named defendant, Guiseppe Campanelli, in the carrying out of the said alleged conspiracy.

IV.

That the said indictment, for the reasons hereinbefore alleged and specified is insufficient to enable the said defendant, Guiseppe Campanelli to make his defense or to properly inform him of the charge against him, or to enable one of common understanding to know and understand the nature of the charges against him.

V.

That the said indictment is not sufficient in form of substance to enable the above-named defendant Guiseppe Campanelli, to plead any judgment thereon, in bar of other prosecution for the same offense. [13]

VI.

These things so above set forth, the above-named defendant is ready to verify.

WHEREFORE, the above-named defendant prays that the foregoing demurrer be sustained, and that he may be discharged of the said indictment.

NATHAN C. COGHLAN,
CLAY A. PEDRAZZINI,
Attorneys for Defendant, Guiseppe Campanelli.

[Endorsed]: Filed Nov. 26, 1924. Walter B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [14]

At a stated term of the District Court of the United States of America for the Northern District of California, First Division, held at the court-room thereof, in the City and County of San Francisco, on Wednesday, the 26th day of November, in the year of our Lord one thousand nine hundred and twenty-four. Present: The Honorable JOHN S. PARTRIDGE, District Judge.

No. 15,828.

UNITED STATES OF AMERICA

vs.

JOSE ABELLON, *alias* F. ABALONE et al.

MINUTES OF COURT—NOVEMBER 26, 1924—PLEA.

On motion of P. A. Vincilione, Esq., attorney for defendant Jose Abellon, *alias* F. Abalone, and certain other defendants, ordered that the Clerk of this court furnish Mr. Vincilione with a copy of indictment herein at expense of the United States.

This case came on regularly for entry of plea of defendant Guiseppe Companelli, who was present with attorney, Clay Pedrazzini, Esq. Mr. Pedrazzini presented demurrer to indictment, which demurrer the Court overruled. Mr. Pedrazzini then moved the Court for order granting permission to present and file plea in abatement, which motion the Court ordered denied. Mr. Pedrazzini entered exceptions to said orders. Said defendant

Guiseppe Companelli thereupon plead "Not Guilty" to indictment filed herein.

This case also came on regularly for entry of plea of defendant John B. De Maria, who was present with attorney, Jas. R. Kelly, Esq. Mr. Kelly presented demurrer to indictment, which demurrer the Court overruled. Mr. Kelly then moved the Court for order granting permission to present and file plea in abatement which motion the Court ordered [15] denied. Mr. Kelly entered exceptions to said orders. Mr. Kelly presented and filed motion to quash indictment, which the Court ordered denied and to which order Mr. Kelly entered exception.

Said defendant John B. De Maria thereupon plead "Not Guilty" to indictment.

Ordered case continued to Nov. 28, 1924, to be set for trial.

Vol. 64, page 263. [16]

At a stated term of the Southern Division of the United States District Court for the Northern District of California, held at the courtroom thereof, in the City and County of San Francisco, on Monday, the 2d day of March, in the year of our Lord one thousand nine hundred and twenty-five. Present: The Honorable ROBERT S. BEAN, District Judge for the District of Oregon, designated to hold and holding this court.

No. 15,828.

UNITED STATES OF AMERICA

vs.

J. O'HAGAN et al.

MINUTES OF COURT—MARCH 2, 1925—TRIAL.

This case came on regularly this day for trial. Defendants were present with respective attorneys, viz: Guiseppe Companelli with W. H. Tully, Esq., J. O. O'Hagan in custody of U. S. Marshal and with J. E. Connolly, Esq., Robert Castagno and Cresentino C. A. Massino in custody of U. S. Marshal and with J. Pardini, Esq., Jose Abellon, J. Bermudez, W. J. Blackmore, J. L. Daniell, Manuel C. Gonzales, Guiseppe Mancardi, Manuel Sanchez Novo, Ramiro Basterrechea Regueiro, Antonio D. Rilo and Augustus Rodney in custody of U. S. Marshal and with P. A. Vincilione, Esq., and John B. De Maria with John T. Williams, Jas. R. Kelly and J. F. McDonald, Esqs.

K. C. Gillis, Esq., Asst. U. S. Atty., was present for and on behalf of United States.

Upon calling of case, all parties answering ready for trial, Court ordered same proceed and that the jury-box be filled from regular panel of trial jurors of this court. Accordingly, the hereinafter named persons, having been duly drawn by lot,

sworn, examined and accepted, were duly [17] sworn as jurors to try the issues herein, viz.:

Chas. W. Dahl,	J. J. Haviside,
Albert L. Hart,	Chas. E. Nosler,
Albert J. Chapman,	Guy B. Kibbe,
Brace Carter,	Herman M. Heim,
Sidney M. Hauptman,	Thos. P. Hartland,
Clarence W. Whitney,	Ruben Overfield.

Thereupon Mr. Gillis made statement to the Court and jury as to the nature of the case.

Counsel for defendants moved Court for order dismissing indictment herein. After hearing attorneys for respective parties, ordered motion denied and to which order an exception was entered.

Mr. Gillis then called certain persons as witnesses on behalf of United States, each of whom was duly sworn and examined, to wit: G. L. Lee, Dr. Geo. M. MacNevin, Mrs. W. B. Cohen and H. S. Creighton; and introduced in evidence on behalf of United States certain exhibits which were filed and marked U. S. Exhibits Nos. 1, 2, 3, 4, 5.

At request of Mr. Williams, statement of John O'Hagan was filed and marked for identification as Defendants' Exhibit "A" for Identification.

Jury having been admonished, Court ordered further trial continued to March 3, 1925, at 10:30 A. M. [18]

At a stated term of the Southern Division of the United States District Court for the Northern District of California, held at the courtroom thereof, in the City and County of San Francisco, on Tuesday, the 3d day of March, in the year of our Lord one thousand nine hundred and twenty-five. Present: The Honorable ROBERT S. BEAN, District Judge for the District of Oregon, designated to hold and holding this court.

No. 15,828.

UNITED STATES OF AMERICA

vs.

J. O'HAGAN et al.

MINUTES OF COURT—MARCH 3, 1925—TRIAL (CONTINUED).

This case came on regularly this day for further trial. Defendants were present with their respective attorneys, viz: Guiseppe Companelli with W. H. Tully, Esq., J. O'Hagan in custody of U. S. Marshal and with J. E. Connolly, Esq., Robert Castagno and Cresentino C. A. Massino in custody of U. S. Marshal and with J. Pardini, Esq., Jose Abellon, J. Bermudez, W. J. Blackmore, J. L. Daniell, Manuel C. Gonzales, Guiseppe Mancardi, Manuel Sanchez Novo, Ramiro Basterrechea Regueiro, Antonio D. Rilo and Augustus Rodney in custody of U. S. Marshal and with P. A. Vincil-

ione, Esq., and John B. De Maria with John T. Williams, Jas. R. Kelly and J. F. McDonald, Esqs.

K. C. Gillis, Esq., Asst. U. S. Atty., was present for and on behalf of United States. Jury was present and complete.

W. A. Newcombe was sworn and examined for United States. H. S. Creighton was recalled for United States. Mr. Gillis then called certain persons as witnesses for United States, each of whom was duly sworn and examined, to wit: Frank H. Rivers, Lawrence A. Hanson, Ignacio Alioto, Pablo Herman, [19] M. G. Sturtevant, S. J. Thompson; and introduced in evidence on behalf of United States certain exhibits which were filed and marked U. S. Exhibits Nos. 6 and 7.

Counsel for defendants presented and filed for identification, on behalf of defendants, certain exhibits which were filed and marked Defendants' Exhibits "B," "C" and "D."

Hour of adjournment having arrived, ordered further trial continued to March 4, 1925, at 10:30 A. M. [20]

At a stated term of the Southern Division of the United States District Court for the Northern District of California, held at the courtroom thereof, in the City and County of San Francisco, on Wednesday, the 4th day of March, in the year of our Lord one thousand nine hundred and twenty-five. Present: The Honorable ROBERT S. BEAN, District Judge for the District of Oregon, designated to hold and holding this court.

No. 15,828.

UNITED STATES OF AMERICA

vs.

J. O'HAGAN et al.

MINUTES OF COURT—MARCH 4, 1925—TRIAL (CONTINUED).

This case came on regularly this day for further trial. Defendants were present with respective attorneys, viz.: Guiseppe Companelli with W. H. Tully, Esq., J. O'Hagan in custody of U. S. Marshal and with J. E. Connolly, Esq., Robert Castagno and Cresentino C. A. Massino in custody of U. S. Marshal and with J. Pardini, Esq., Jose Abellon, J. Bermudez, W. J. Blackmore, J. L. Daniell, Manuel C. Gonzales, Guiseppe Mancardi, Manuel Sanchez Novo, Ramiro Bastenechea Regueiro, Antonio D. Rilo and Augustus Rodney in custody of U. S. Marshal and with P. A. Vincilione, Esq.,

and John B. De Maria with John T. Williams, Jas. R. Kelly and J. F. McDonald, Esqs.

K. C. Gillis, Esq., Asst. U. S. Atty., was present for and on behalf of United States.

The jury heretofore impaneled and sworn to try defendants was present and complete.

Certain persons were called as witnesses for United States, each sworn and examined, to wit: Salvadore Alioto, who was examined thru Interpreter Paul De Martini who was [21] duly sworn as such, Frank Landl, George W. Beermaker, John Richardson, B. W. Grable, John L. Benson, Alf Oftedahl, P. Campania, H. F. Duff and Chris Runkle. Witness S. J. Thompson was recalled and further examined.

Certain exhibits were introduced in evidence on behalf of United States, filed and marked U. S. Exhibits Nos. 8, 9 and 10; and rested case of United States.

After hearing Mr. Gillis, ordered that the U. S. Exhibits heretofore introduced and filed herein as U. S. Exhibits Nos. 5 and 6 be withdrawn from case and files, and accordingly same were returned to Mr. Gillis in open court.

Counsel for defendants made a motion for order instructing jury to return verdict of not guilty, and after hearing attorneys, Court reserved its ruling upon said motion until close of testimony.

After hearing attorneys, ordered further trial continued to March 5, 1925, at 10 A. M. [22]

At a stated term of the Southern Division of the United States District Court for the Northern District of California, held at the courtroom thereof, in the City and County of San Francisco, on Thursday, the 5th day of March in the year of our Lord one thousand nine hundred and twenty-five. Present: The Honorable ROBERT S. BEAN, District Judge for the District of Oregon, designated to hold and holding this court.

No. 15,828.

UNITED STATES OF AMERICA

vs.

J. O'HAGAN et al.

MINUTES OF COURT—MARCH 5, 1925—TRIAL (CONTINUED).

This case came on regularly this day for further trial. Defendants were present with respective attorneys, viz.: Guiseppe Companelli with W. H. Tully, Esq., J. O'Hagan in custody of the U. S. Marshal and with J. E. Connolly, Esq., Robert Castagno and Cresentino C. A. Massino in custody of U. S. Marshal and with J. Pardini, Esq., Jose Abellon, J. Bermudez, W. J. Blackmore, J. L. Daniell, Manuel C. Gonzales, Guiseppe Mancardi, Manuel Sanchez Novo, Ramiro Basterrechea Regueiro, Antonio D. Rilo and Augustus Rodney in custody of U. S. Marshal and with P. A. Vin-

cilione, Esq., and John B. De Maria with John T. Williams, Jas. R. Kelly and J. F. McDonald, Esqs.

K. C. Gillis., Esq., Asst. U. S. Atty, was present for and on behalf of United States.

Jury heretofore impaneled and sworn to try defendants was present and complete.

Mr. Tully called Joseph Lippi and G. Bracini as witnesses on behalf of defendants, each of whom was duly sworn and examined, and recalled H. S. Creighton as witness [23] for defendants. Mr. Connolly called defendant John O'Hagan, who was duly sworn and examined as witness for defendants.

Certain exhibits were introduced in evidence on behalf of defendants, filed and marked Defendants' Exhibits Nos. "E," "F" and "G."

Counsel for defendants thereupon rested case on behalf of each defendant.

Mr. Gillis then recalled, on behalf of United States in rebuttal, H. S. Creighton and then called J. H. Morris and G. G. Kenny as witnesses on behalf of United States, each of whom was duly sworn and examined.

Thereupon Court ordered further trial continued to March 6, 1925, at 10 A. M. [24]

At a stated term of the Southern Division of the United States District Court for the Northern District of California, held at the courtroom thereof, in the City and County of San Francisco, on Friday, the 6th day of March, in the year of our Lord one thousand nine hundred and twenty-five. Present: The Honorable ROBERT S. BEAN, District Judge for the District of Oregon, designated to hold and holding this court.

No. 15,828.

UNITED STATES OF AMERICA

vs.

J. O'HAGAN et al.

MINUTES OF COURT—MARCH 6, 1925—TRIAL (CONTINUED).

This case came on regularly this day for further trial. Defendants were present with respective attorneys, viz.: Guiseppe Companelli with W. H. Tully, Esq., J. O'Hagan in custody of U. S. Marshal and with J. E. Connolly, Esq., Robert Castagno and Cresentino C. A. Massino in custody of U. S. Marshal and with J. Pardini, Esq., Jose Abellon, J. Bermudez, W. J. Blackmore, J. L. Daniell, Manuel C. Gonzales, Guiseppe Mancardi, Manuel Sanchez Novo, Ramiro Basterrechea Regueiro, Antonio D. Rilo and Augustus Rodney in custody of U. S. Marshal and with P. A. Vincilione, Esq.,

and John B. De Maria with John T. Williams, Jas. R. Kelly and J. F. McDonald, Esqs.

K. C. Gillis, Esq., Asst. U. S. Atty., was present for and on behalf of United States.

Jury heretofore impaneled and sworn to try defendants was present and complete.

Case was argued by Mr. Gillis, Mr. Vincilione, Mr. Pardini, Mr. Connolly, Mr. Tully and Mr. Gillis.

Hour of adjournment having arrived, ordered further trial continued to March 7, 1925, at 10 A. M. [25]

At a stated term of the Southern Division of the United States District Court for the Northern District of California, held at the courtroom thereof, in the City and County of San Francisco, on Saturday, the 7th day of March, in the year of our Lord one thousand nine hundred and twenty-five. Present: The Honorable ROBERT S. BEAN, District Judge for the District of Oregon, designated to hold and holding this court.

No. 15,828.

UNITED STATES OF AMERICA

vs.

J. O'HAGAN et al.

MINUTES OF COURT—MARCH 7, 1925—TRIAL (CONTINUED).

This case came on regularly this day for further trial. Defendants were present with respective attorneys, viz.: Guiseppe Companelli with W. H. Tully, Esq., J. O'Hagan in custody of U. S. Marshal and with J. E. Connolly, Esq., Robert Castagno and Cresentino C. A. Massino in custody of U. S. Marshal and with J. Pardini, Esq., Jose Abellon, J. Bermudez, W. J. Blackmore, J. L. Daniell, Manuel C. Gonzales, Guiseppe Mancardi, Manuel Sanchez Novo, Ramiro Basterrechea Regueiro, Antonio D. Rilo and Augustus Rodney in custody of U. S. Marshal and with P. A. Vincilione, Esq., and John B. De Maria with John T. Williams, Jas. R. Kelly and J. F. McDonald, Esqs.

K. C. Gillis, Esq., Asst. U. S. Atty., was present for and on behalf of United States.

Jury heretofore impaneled and sworn to try defendants was present and complete.

Court proceeded to instruct jury, who, after being so instructed, retired at 10:50 A. M., to deliberate upon a verdict. During deliberation of jury, ordered that the [26] U. S. Marshal furnish jury and two bailiffs with lunch, at expense of United States. Jury returned into court at 4 P. M., and upon being called all twelve (12) jurors answered to their names and were found to be present, and, in answer to question of the Court, stated they had agreed upon a verdict and presented written verdict, which the Court ordered filed and recorded,

viz: "We, the Jury, find as to the defendants at the bar as follows:

Jose Abellon ..... Not Guilty.
J. Bermudez ..... Not Guilty.
W. J. Blackmore ..... Not Guilty.
Robert Castagno ..... Not Guilty.
Guiseppe Companelli ..... Guilty.
J. L. Daniell ..... Not Guilty.
John B. De Maria ..... Not Guilty.
Manuel C. Gonzales ..... Not Guilty.
J. O'Hagan ..... Guilty—Leniency Recommended.
Guiseppe Mancardi ..... Not Guilty.
Cresentino C. A. Massino ..... Not Guilty.
Manuel Sanchez Novo ..... Not Guilty.
Ramiro Basterrechea Regueiro ..... Not Guilty.
Antonio D. Rilo ..... Not Guilty.
Augustus Rodney ..... Not Guilty.

BRACE CARTER,
Foreman."

After hearing attorneys, ordered judgments as to defendants J. O'Hagan and Guiseppe Campanelli be continued to March 10, 1925.

After hearing attorneys, further ordered that defendant Guiseppe Companelli, in default of new bond in sum of $5,000.00, stand committed and that *mittimus* issue.

Ordered that defendants Jose Abellon, J. Bermudez, W. J. Blackmore, Robert Castagno, J. L. Daniell, John B. De Maria, Manuel C. Gonzales, Guiseppe Mancardi, Cresentino C. A. Massino, Manuel Sanchez Novo, Ramiro Basterrechea Regueiro, Antonio D. Rilo and Augustus Rodney be

and they are hereby discharged and go hence without day, and that the bonds heretofore given for their appearance herein be and same are hereby exonerated.

Ordered jurors discharged from further consideration of case. [27]

In the Southern Division of the United States for the Northern District of California.

No. 15,828.

THE UNITED STATES OF AMERICA

vs.

JOSE ABELLON et al.

VERDICT.

We, the Jury, find as to the defendants at the bar as follows:

Jose Abellon ..... Not Guilty.
J. Bermudez ..... Not Guilty.
W. J. Blackmore ..... Not Guilty.
Robert Castagno ..... Not Guilty.
Guiseppe Companelli ..... Guilty.
J. L. Daniell ..... Not Guilty.
John De Maria ..... Not Guilty.
Manuel C. Gonzales ..... Not Guilty.
J. O'Hagan ..... Guilty—Leniency Recommended.
Guiseppe Mancardi ..... Not Guilty.
Cresentino C. A. Massino ..... Not Guilty.
Manuel Sanchez Novo .....Not Guilty.
Ramiro Basterrechea Regueiro ..... Not Guilty.

Antonio D. Rilo ..... Not Guilty.
Augustus Rodney ..... Not Guilty.

BRACE CARTER,
Foreman.

[Endorsed]: Filed March 7th, 1925, at 4 o'clock P. M. W. B. Maling, Clerk. By Lyle S. Morris, Deputy. [28]

In the Southern Division of the United States District Court for the Northern District of California, First Division.

No. 15,828.

UNITED STATES OF AMERICA,
Complainant,

vs.

J. O'HAGAN et al.,
Defendants.

MOTION FOR ORDER VACATING VERDICT OF JURY AND GRANTING NEW TRIAL.

The defendant Guiseppe Companelli hereby moves this Honorable Court for an order vacating the verdict of the jury herein, and granting to the said defendant a new trial for the following causes, and each of them, materially affecting the constitutional rights of the said defendant:

I.

Said verdict was contrary to the evidence adduced upon the trial hereof.

II.

Said evidence was insufficient to justify said verdict.

III.

Said verdict was contrary to law.

IV.

That the Court erred in his instructions to the jury, in refusing the defendant's instructions and in deciding questions of law arising during the course of the trial hereof, which errors were duly excepted to.

This motion is made upon the minutes of the court, and all other records and proceedings in the above-entitled cause.

Dated: San Francisco, California, March 10th, 1925. [29]

WILFORD H. TULLY,
Attorney for Defendant, Guiseppe Companelli.

[Endorsed]: Filed Mar. 10, 1925. Walter B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [30]

In the Southern Division of the United States District Court for the Northern District of California, First Division.

No. 15,828.

UNITED STATES OF AMERICA,
Complainant,

vs.

J. O'HAGAN et al.,
Defendants.

MOTION IN ARREST OF JUDGMENT.

Now comes Guiseppe Companelli one of the defendants in the above-entitled cause, and respectfully moves the Court to arrest and withhold judgment of the above-entitled cause, and that the verdict of conviction of said defendant heretofore given and made in said cause be vacated and set aside and declared to be null and void, and of no force, virtue or effect for each of the following causes and reasons:

I.

It appears upon the face of the record herein that no judgment can be legally entered against the said defendant for the following reasons, to wit:

(1) The facts stated in the indictment on file herein, and upon which said conviction was and is based, do not constitute a crime or public offense within the jurisdiction of this court.

(2) That said indictment does not state facts sufficient to charge the said defendant with any crime or offense against the United States.

(3) The said indictment does not state facts sufficient to charge the said defendant with having conspired to commit any crime or offense against the said United States. [31]

(4) That the said indictment does not state facts sufficient to charge the said defendant with any crime against the United States in this, to wit, that all and singular the matters, things and acts which the said indictment alleges that said defendant conspired to do are not nor is any of said

matters, things or acts a crime under any law or statute of the United States of America.

II.

That this Honorable Court has no jurisdiction to pass judgment upon said defendant by reasons of the fact that the said indictment failed to charge said defendant with any crime against the United States; and, further, that this Honorable Court has no jurisdiction to pass judgment upon the said defendant by reason of the fact that the testimony introduced in the trial of said cause showed or tended to show that a crime, if any, had been committed outside of the Northern District of the State of California, and in a foreign jurisdiction.

WHEREFORE, by reason of the premises the said defendant prays of this Honorable Court that judgment herein be arrested and withheld, and that the conviction of said defendant be declared null and void.

Dated: March 10th, 1925.

WILFORD H. TULLY,
Attorney for said Guiseppe Companelli.

[Endorsed]: Filed Mar. 10, 1925. Walter B. Maling, Clerk. C. W. Calbreath, Deputy Clerk. [32]

At a stated term of the Southern Division of the United States District Court for the Northern District of California, held at the courtroom thereof, in the City and County of San Francisco, on Wednesday, the 10th day of March, in the year of our Lord one thousand nine hundred and twenty-five. Present: The Honorable ROBERT S. BEAN, District Judge for the District of Oregon, designated to hold and holding this court.

No. 15,828.

UNITED STATES OF AMERICA

vs.

J. O'HAGAN et al.

MINUTES OF COURT—MARCH 10, 1925—JUDGMENT.

This case came on regularly this day for pronouncing of judgment as to defendant J. O'Hagan, who was present in custody of U. S. Marshal and with his Attorney, J. E. Connolly, Esq. G. J. Fink, Esq., Asst. U. S. Atty., was present for and on behalf of United States. After hearing attorneys, ordered that defendant J. O'Hagan be imprisoned for period of ten and one-half months (10½) in the County Jail, County of San Francisco, State of California, and that defendant stand committed to custody of U. S. Marshal to execute said judgment of imprisonment, and that a Commitment Issue.

This case also came on regularly this day for pronouncing judgment as to defendant Guiseppe Companelli, who was present with Attorney, W. H. Tully, Esq. Mr. Tully made a motion for new trial, which motion the Court ordered denied. Mr. Tully then made a motion in arrest of judgment, which motion the Court likewise ordered denied. After hearing Mr. Tully and Mr. Fink, ordered that defendant Guiseppe Companelli be imprisoned for period of two (2) years in the [33] United States Penitentiary at Leavenworth, Kansas, and that defendant pay fine of Five Hundred ($500.00) Dollars or, in default of fine, defendant be further imprisoned until said fine is paid or he be otherwise discharged by due process of law. Ordered that said defendant stand committed to custody of U. S. Marshal for this District to execute said judgment, and that a Commitment issue. [34]

In the Southern Division of the United States District Court for the Northern District of California, First Division.

No. 15,828.

THE UNITED STATES OF AMERICA

vs.

GUISEPPE COMPANELLI.

JUDGMENT ON VERDICT OF GUILTY.

Conv. Viol. Section 37 C. C. U. S. (Cons. to Viol. National Prohibition Act.)

Kenneth C. Gillis, Esq., Assistant United States Attorney, and the defendant with his counsel came into court. The defendant was duly informed by the Court of the nature of the Indictment filed on the 12th day of November, 1924, charging him with the crime of violation of Section 37 C. C. U. S. (Cons. to violate National Prohibition Act); of his arraignment and plea of Not Guilty; of his trial and the verdict of the Jury on the 7th day of March, 1925, to wit:

"We, the Jury find as to the defendants at the bar as follows:

Jose Abellon .....Not Guilty
J. Bermudez .....Not Guilty
W. J. Blackmore .....Not Guilty
Robert Castagno .....Not Guilty
Guiseppe Companelli .....Guilty
J. L. Daniell .....Not Guilty
John B. DeMaria .....Not Guilty
Manuel C. Gonzales .....Not Guilty
J. O'Hagan .....Guilty—Leniency recommended.
Guiseppe Mancardi .....Not Guilty
Cresentino C. A. Massino .....Not Guilty
Manuel Sanchez Novo .....Not Guilty
Ramiro Basterrechea Regueiro .....Not Guilty

Antonio D. Rilo .....Not Guilty
Augustus Rodney .....Not Guilty
[35]

BRACE CARTER,
Foreman."

The defendant was then asked if he had any legal cause to show why judgment should not be entered herein and no sufficient cause being shown or appearing to the Court, and the Court having denied a motion for new trial and a motion in arrest of judgment; thereupon the Court rendered its judgment;

THAT, WHEREAS, the said Guiseppe Companelli having been duly convicted in this court of the crime of violating Section 37 C. C. U. S. (Cons. to violate National Prohibition Act),

IT IS THEREFORE ORDERED AND ADJUDGED that the said Guiseppe Companelli be imprisoned for the period of two (2) years in the United States Penitentiary at Levenworth, Kansas, and pay a fine in the sum of Five Hundred ($500.00) Dollars; further ordered that in default of the payment of said fine that said defendant be further imprisoned until said fine be paid or until he be otherwise discharged in due course of law.

Judgment entered this 10th day of March, A. D. 1925.

WALTER B. MALING,
Clerk.
By C. W. Calbreath,
Deputy Clerk.

Entered in Vol. 18, Judg. and Decrees, at page 317. [36]

In the Southern Division of the United States District Court, in and for the Northern District of California, First Division.

Before Hon. ROBERT S. BEAN, Judge.

No. 15,828.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

J. O'HAGAN et al.,

Defendants.

BILL OF EXCEPTIONS OF DEFENDANT GUISEPPE CAMPANELLI.

The above-entitled cause came on for trial March 2, 1925, at the hour of 10 o'clock A. M. at the City and County of San Francisco, State of California. Kenneth C. Gillis, Esq., Assistant United States Attorney, appearing for plaintiff; Messrs. Williams, Kelly & McDonald appearing for defendant John D. Maria; Wilford H. Tully, Esq., appearing for the defendant G. Campanelli; Joseph Connolly, Esq., appearing for the defendant J. O'Hagan; P. A. Vincilione, Esq., appearing for the Crew; and Julian A. Pardini, Esq., appearing for Mossiano Crescentino and Roberto Castagno; and a jury having been empanelled and sworn to try the case, thereafter the following proceedings were had, testimony taken, and evidence, oral and documentary, was introduced on behalf of the United States, as follows:

OPENING STATEMENT FOR THE UNITED STATES.

Mr. GILLIS.—May it please the Court and you, Gentlemen of the Jury: I will briefly outline to you the facts that the Government expects to show from the witnesses who will take the witness stand, to establish the case of the Government against these individuals. To begin with, there are thirteen individuals, the [37] captain and members of the crew of the steamer "Giulia," which was sunk out somewhere on the Pacific Ocean, defendants in this case; there are two other defendants who have been apprehended and who are before the Court, Mr. De Maria and Mr. Campanelli, who are also the two other defendants who have been apprehended. There are a number of other defendants named in the indictment but the Government, up to the present time, has been unable to apprehend the several other defendants therein named.

The Government will show that in the fall of 1923, and the spring of 1924, two of the defendants who were not apprehended here, a man by the name of Henderson, and a man by the name of McMillan, came to San Francisco and entered into the Colombo Bullion Mines Co. office, ostensibly to take an interest, and, as a matter of fact, did have an interest in that mine that had its office here, but in their operations ran booze-runner ships; that in February or April of 1924 there was seized from one of the wharves here in San Francisco a small boat by the name of "May Heyman," which we will

directly connect up with these two individuals, and there was something like 1,700 cases of beer that was taken from that boat; the boat was seized and confiscated by the Government at that time. That during the spring months of 1924 Mr. Henderson and Mr. McMillan, and Campanelli and De Maria—Campanelli and De Maria, keep in mind, are the two defendants who are before you—with the captain and crew of the "Giulia," entered into negotiations with a shipbuilding concern in Los Angeles, in which they purchased a vessel then known as the "Frontiersman," which was a style of yacht, and in Los Angeles and San Francisco secured a crew for this boat; that at the time Mr. Campanelli and Mr. McMillan were the two particular individuals who were doing the active part, so far as the actual purchase of this boat from the Los Angeles concern is concerned; and that as soon as they had the boat repaired and outfitted with their captain and crew, they sent her down to Havana, Cuba, Mr. De Maria, Mr. Campanelli, [38] and Mr. Henderson going by train and then by boat over to Havana; that in Havana, Cuba, the boat was loaded up with several thousand cases of liquor, that that cargo consisted entirely of liquor consigned, I believe, to Vancouver, with the privilege of making delivery of this cargo on the high seas outside of the twelve-mile limit, as recognized by the treaty between Great Britian and the United States. This ship, however, was sailing under the Panaman flag; that this boat came from Havana, Cuba, and after she had arrived outside of the Golden Gate and was stationed there for

some little time, and during that time she unloaded aproximately 2,000 or 3,000 or 4,000 cases of liquor into the United States. We will show the unloading of this liquor by boats that actually came in contact with her, by men who actually went out in small boats and took the liquor from the "Frontiersman," whose name was later changed to the name of "Giulia." We have been simply calling her "Julia," because it is so easy to pronounce it. That there was also a boat which took coal out to this "Giulia" while she was out on this first trip. This coal, as a matter of fact, was delivered to the "Giulia" within almost a stone's throw of a part of the coast here, near San Francisco; that the "Giulia" then ran out of coal, or very nearly ran out of coal, and she was compelled to go back to some neutral, some foreign port, in order to re-fuel herself; that she went from her station outside the 12-mile limit of San Francisco Bay and went back to Ensenada, Mexico, and there Mr. Campanelli and Mr. De Maria, both of whom are before you, gentlemen, arranged for recoaling of this boat, and that the boat was coaled, recoaled under their supervision, with coal that they actually purchased; that after being re-coaled she again came up to San Francisco and lay outside of the Heads, here, for quite a considerable period of time, and later ran out of coal again, a storm blew up, and they were blown off their course, and the boat was [39] finally scuttled, and the crew were brought into San Francisco and delivered over to the Customs and Immigration Officers.

I think that covers practically the entire situation, the entire transaction that the Government expects to prove.

We are not charging in this indictment a direct violation of the Prohibition Act, or of the Customs Act, but we are charging a conspiracy to violate those acts. And when we have done all of those things, gentlemen, we will expect a verdict at your hands.

Upon the suggestion of counsel the Court made an order that any objection made by one counsel would be deemed to be made on behalf of all the defendants, and an exception would be deemed to be taken to each and every ruling without orally reserving the same.

Thereafter the defendants made the following motions which were overruled and the rulings duly excepted to:

Mr. WILLIAMS.—We have a couple of motions here that go to the question of jurisdiction, and then there is a matter that I would like to submit to the Court, while the court is still in session, and which, I believe, should not be taken up before the jury. I can state very briefly that this last matter relates to certain statements that may have been given, or that we understand have been given after the termination of the conspiracy, and I believe that those statements are to be used to refresh the memory of certain witnesses, and I think there should be a deletion of certain matter, and should like to present that matter to the Court. . . . .

The COURT.—That question can be raised during the trial.

Mr. WILLIAMS.—At this time, if your Honor please, I would like to move the Court for an order dismissing this particular action, and I make this motion on behalf of and upon the request of all the other counsel, although my firm, Williams, Kelly & McDonald, represent but Mr. De Maria, one of the defendants; that is the only defendant that we represent; but we do move to dismiss this indictment [40] and object to proceeding with this trial upon two grounds, that we deem good.

The indictment, upon its face, states that this grand jury was empanelled for the term beginning the first Monday in July of last year, which term ends on October 31, 1924. There is a recital in the indictment that the grand jury was continued thereafter, and continued in session, but there is no recital in that indictment that the grand jury was continued to a date after November 12, the date on which this grand jury manifestly filed the indictment; in other words, the indictment was filed 12 days after the expiration of the term. We take it that as a matter of pleading, so that this Court might have jurisdiction, that the indictment must contain the exception, to wit, that this matter was continued before the grand jury to a time over and beyond the date of the expiration of the July term, to wit, October 31. There is a general allegation of a continuance, but it does not appear, and under the decisions, exceptions of this kind, which are away from the general rule of procedure, must be

pleaded, in order that it shall appear upon the face of the proceeding that the Court has jurisdiction.

We ask a ruling of the Court on that.

The COURT.—Is that the only motion?

Mr. WILLIAMS.—Yes, on that point.

The COURT.—Have you got any other point?

Mr. WILLIAMS.—The other is this: The decisions recite that it must appear affirmatively upon the face of the indictment that the members of the grand jury were sworn before they proceeded to determine what was pending before them. There is a statement in this particular indictment that the grand jury was duly empaneled. The allegation is not tantamount to stating that the grand jury was duly sworn, any more than would have been a statement of the grand jury that it had duly found said indictment, or duly returned said [41] indictment.

Upon these two grounds I at this time move the Court for an order dismissing the indictment, upon the ground that the Court has no jurisdiction over the subject matter of the offense charged, or of the defendants, because it was not an indictment found by a grand jury within the term for which they were summoned, and second, because it does not show on the face of the indictment that the grand jury was duly sworn. . . . .

Mr. TULLY.—Might I, on behalf of Mr. Campanelli, join in the same motion? . . . .

The COURT.—The Court is of opinion that neither of these points is well taken. In the first place, the presumption is that the grand jury were

regularly in session. I suppose the Court records show it was continued. I do not understand that the law requires that an indictment shall show on its fact that the grand jury was sworn. That is a matter that is attended to when a grand jury is empaneled. . . . .

Mr. WILLIAMS.—I want to note an exception to your Honor's ruling. That applies to both motions?

The COURT.—Yes. You already have it in the record on your motion to quash. . . . .

TESTIMONY OF G. L. LEE, CALLED FOR THE UNITED STATES.

G. L. LEE, a witness called on behalf of the United States, being first duly sworn, testified as follows:

I am a prohibition agent employed since February 5, 1924, by the United States Government.

Mr. GILLIS.—Q. Did you have occasion to visit pier 16 in this city on April 10 of 1924?

A. I did.

Q. Just where is that located?

A. It is at the end of 16th Street.

Q. This city?

A. It is what is called the 16th street pier. [42]

Q. That is in this city? A. Yes.

Q. Did you see the boat "Mae Heyman" at that time? A. I did.

Q. Just state what happened at that particular time?

A. About 9 P. M. of April 10 I received a tele-

(Testimony of G. L. Lee.)

phone call from Agent Campelong that there was something doing down at the pier. We walked down on the pier until we got nearly to the outer end and we paused behind a pile of lumber and we could hear the clicking of bottles; we waited there a few minutes and about 10:30 we went out and demanded that they throw up their hands; some of the men were on the boat and some on the pier.

Q. What boat was that?

A. The "Mae Heyman"; and we afterwards counted the sacks which numbered 119, that had already been taken out of hold No. 1.

Q. Out of the hold of the boat onto the pier?

A. From the hold of the boat onto the pier. They were removing them while we were standing behind the pile of lumber.

Q. You made a seizure, then, at that time?

A. We seized the boat and the liquor, and arrested the men.

Q. How much liquor? A. 1,705 cases.

Mr. WILLIAMS.—The pleading is very general in scope, and the testimony here relates to a boat called the "Mae Heyman," and as this evidence comes in at this particular time we desire at this time to move to strike it out, because it does not appear that it is relevant to this conspiracy in any possible manner.

The COURT.—Of course, the Government cannot develop its case at one time.

Mr. WILLIAMS.—I know that. I know your Honor will rule against me, but I want to take an

(Testimony of G. L. Lee.)

exception to your Honor's ruling and then can I reserve a motion to strike it out?

The COURT.—Yes, unless the Government connects it up with these defendants. [43]

Mr. WILLIAMS.—I ask for an exception and the privilege of renewing the motion later on.

Mr. TULLY.—May that go as to all the defendants?

Mr. GILLIS.—Q. There were how many sacks seized? A. 1,705.

Q. How was the liquor packed?

A. It was in pint bottles with a wrapper, a heavy wrapper around it and then in regular sacks, sewed tight on the end, just like smuggled Scotch would come in, the same way.

Q. And was the "Mae Heyman" seized at that time? A. It was.

Mr. WILLIAMS.—We renew our motion, if your Honor please.

The COURT.—It will be overruled.

Mr. WILLIAMS.—Exception. . . . .

The COURT.—What did you say in answer to his question?

A. I did not arrest any of these defendants.

Q. None of these defendants?

A. No. . . . .

Mr. VINCILIONE.—I ask on behalf of the crew that the evidence of the last witness be stricken out as being hearsay, not being connected with any of the defendants represented here.

The COURT.—As I stated a moment ago, the

(Testimony of George Michael MacNevin.)
Government cannot put on its case at one time. The motion will be denied. . . . .

Upon cross-examination the witness testified as follows:

All the material taken off the boat was beer. I did not take into custody any of the defendants in this case. None of these defendants were there. [44]

TESTIMONY OF GEORGE MICHAEL MacNEVIN, CALLED FOR THE UNITED STATES.

GEORGE MICHAEL MacNEVIN, a witness called on behalf of the United States, being first duly sworn testified as follows:

My profession is that of a dentist.

Mr. GILLIS.—In the spring of 1923 did you become acquainted with a man by the name of Daniel Henderson? A. Yes, I did.

Q. And a man by the name of Guyvan McMillan?

A. Yes, I did.

Q. Where was it that you became acquainted with them?

A. In the office of the Colombo Mining Co. . . . .

Q. Did you see them quite frequently from that time up to March, 1924?

A. I saw them, yes, most every few days; I had occasion to go into the office in the morning to see what they were doing in regard to the mine; some

(Testimony of George Michael MacNevin.)

days I would see Mr. Henderson, but Mr. McMillan was there most all of the time; he seemed to be the secretary, or acting as secretary for Mr. Henderson.

Q. At any of the times that you saw Mr. McMillan, or Mr. Henderson, did you have any conversation with either of them with reference to the smuggling of liquor into this country by either of those individuals?

Mr. WILLIAMS.—Just a moment; I just want to preserve my record on behalf of the defendant De Maria. I object to the testimony as immaterial, irrelevant and incompetent, hearsay, and there is no foundation laid at this time as to the connection of the defendant De Maria with any conspiracy.

The COURT.—I will overrule it.

Mr. WILLIAMS.—Note an exception.

Mr. TULLY.—I make the same objection on behalf of the defendant Campanelli.

The COURT.—I do not think it is necessary to take up the time of the Court in making motions of this kind, because, as I [45] said, if this evidence is not connected up it will be withdrawn from the jury.

Mr. WILLIAMS.—May we have that order?

. . . .

Mr. TULLY.—May I make the further objection that any declarations made by a co-conspirator are inadmissible at this time because the conspiracy is not proven, and I wish to reserve an exception.

. . . .

(Testimony of George Michael MacNevin.)

Q. Was there anything in any of the conversation said about the ship "Ardenza"? A. Yes.

Q. What was that?

A. Well, I originally started with a man named Manning, who came in and was to put in a certain amount of money into the mining venture. After about a month and a half he brought in Mr. Henderson and Mr. Stevens, and represented them to me as being English capitalists with a world of money, both multimillionaires, and wanted to know if I had any objection to their putting some money in, in his interest, that he was not able to carry the whole interest on himself; so I said I had no objection at all. At that time I met Mr. Stevens, who was supposed to be the owner of the "Ardenza," which came out in the papers later was his ship.

Q. Anything said about the ownership of the cargo of liquor that was aboard the "Ardenza"?

A. Mr. Henderson claimed he owned the cargo.

Q. Did he state where the boat "Ardenza" was at that time? A. Yes.

Q. Where? A. Right outside of the Heads, here.

Q. That is, outside of San Francisco?

A. Yes, right off the Bay.

Q. Did you ever hear or see anything about a black book that Henderson had?

Mr. TULLY.—We object to this line of questioning, your Honor, and also suggest that we cannot see any materiality of it with [46] reference to

(Testimony of George Michael MacNevin.)

the particular case here, nothing said that involves any of these other defendants who are on trial. This is bringing in matter we know nothing at all about.

The COURT.—He can answer the question. The objection is overruled.

Mr. TULLY.—Exception.

A. I saw a black book there at one time, and when I wanted him to vacate the office, or give up the other office, he told me that that represented so many thousand cases of whiskey, and he had it there as coal. I said, "What are you doing with so many tons of coal at the mine? We do not use only a little bit of blacksmithing coal." And he said, "That represents a cargo that I have outside, and when I sell that I will have available money to go on." . . . .

Mr. WILLIAMS.—With all due respect to your Honor, we again renew our motion to strike out all of the testimony as being hearsay.

The COURT.—It will be overruled.

Mr. WILLIAMS.—Note an exception. . . . .

TESTIMONY OF MRS. JUANITA BUNZEL COHEN, CALLED FOR THE UNITED STATES.

Mrs. JUANITA BUNZEL COHEN, a witness called on behalf of the United States, being first duly sworn, deposes and says: That she was employed by the Colombo Bullion Mines Co. in De-

(Testimony of Mrs. Juanita Bunzel Cohen.)

cember, 1923, and during that month met Daniel Henderson and Guyvan McMillan.

Mr. GILLIS.—You saw Mr. McMillan?

A. Yes.

Q. I will show you a bill, Mrs. Cohen, to the King Coal Co., and ask you if you recognize that?

A. I do not recognize the bill, but I know that I paid it.

Q. You paid a bill to the King Coal Co.?

A. Yes.

Q. On December 5, 1923?

A. Thereabouts, I don't remember the date.

Q. Do you remember about how much it was?

A. No; it was quite a bit. [47]

Q. Over $300?

A. It was quite a bit; I could not remember the exact amount.

Q. Could you remember that it was over $300?

A. I would not. It was in currency.

Q. It was in currency? A. Yes.

Q. Did you pay the bill, yourself? A. Yes.

Q. Who gave you the money to pay it?

A. Mr. McMillan.

Mr. WILLIAMS.—If your Honor please, this transaction, as I understand, relates to a period in December, 1923. While they are not restricted to the exact date of the alleged conspiracy, on or about February, 1924, that is a couple of months or so before. We object to this testimony as anterior to the time of the conspiracy that is alleged to have been entered into.

(Testimony of Mrs. Juanita Bunzel Cohen.)

The COURT.—I suppose the Government is leading up to it.

Mr. GILLIS.—Yes.

The COURT.—Overruled.

Mr. WILLIAMS.—Exception.

Mr. GILLIS.—Q. Who gave you the currency to pay this bill? A. Mr. McMillan.

Q. That is Guyvan McMillan? A. Yes.

Mr. GILLIS.—That is all.

Mr. WILLIAMS.—I would like to make the same motion with regard to that.

The COURT.—Overruled.

Mr. WILLIAMS.—Exception. . . . .

TESTIMONY OF H. S. CREIGHTON, CALLED ON BEHALF OF THE UNITED STATES.

H. S. CREIGHTON, a witness called on behalf of the United States, being first duly sworn, testified as follows:

I am a custom agent employed for the last sixteen years by the United States Government. In such capacity I interviewed the Captain and several members of the ship "Gulia" and took certain [48] papers from Captain O'Hagan.

Mr. GILLIS.—I show you one, evidently a part of a manifest, and ask you if that is one of the papers which was taken, part of the papers of the "Giulia's" crew? A. Yes, it is.

Mr. GILLIS.—I ask that this be introduced in evidence and marked Government's exhibit first in order.

Mr. CONNOLLY.—I object on the ground that it is not the best evidence; this purports to be a copy of the original document. Furthermore, the document was prepared, evidently, and executed in a foreign country, it is not properly authenticated, so that it can be received in evidence at this time, or at any time throughout the trial. Furthermore, it is a copy, and not the best evidence. I object on those grounds.

Mr. GILLIS.—It was seized or taken from the captain of the "Giulia," and is part of the ship's papers.

Mr. TULLY.—May I make the further objection that no foundation has been laid.

The COURT.—It will be received in evidence.

(The document was marked U. S. Exhibit 1.)

Mr. TULLY.—May we reserve an exception.

The COURT.—Certainly.

Mr. VINCILIONE.—In order to save time, may it be understood that every time there is an exception taken by all defendants?

The COURT.—Yes.

Mr. GILLIS.—I desire to call the attention of the jury to this instrument. "Anglo Cuban Steamship Co.," a receipt for 8418 packages of merchandise, listed as 7223 packages of whiskey, 400 packages of gin, 40 packages of rum—

Mr. CONNOLLY.—If your Honor please, inasmuch as the whole document is introduced in evidence, I demand that the whole document be read to the jury, and not some isolated parts of it. [49]

(Testimony of H. S. Creighton.)

The COURT.—Very well.

Mr. GILLIS.—265 packages of wines, 65 packages of brandy—

Mr. GILLIS.—That is up to you. I will read what I think is material:

"223 packages of liquors, 200 packages of champagne, 2 cases cigars, Vancouver, in transit. Consignees to have the option, weather permitting, to take delivery on the high seas, but in no case, and under no circumstances, is delivery to be made within 20 miles of any territory, and then only on the Pacific Coast within a radius of a line drawn due west of San Diego and a line due west of Seattle, always at least 20 miles from such described coast or territories. All island territories within this described area to be taken as the measurement point for such deliveries, if made, in order to conform with a recent treaty made between Great Britain and the U. S. A. Also should the maximum speed of any vessel taking delivery be more than 15 miles per hour, such excess speed must be added to the delivery distance from the within described area."

Q. I show you another instrument, Mr. Creighton, and ask you if this is one of the instruments that was taken from Captain O'Hagan, of the steamer "Giulia"?

The COURT.—Is the captain one of the defendants in this case?

Mr. GILLIS.—The Captain is, and is present in court.

(Testimony of H. S. Creighton.)

Mr. McDONALD.—Have you a translation of this?

Mr. GILLIS.—No, I have not. I ask that that be introduced in evidence and marked Government's exhibit next in order.

Mr. VINCILIONE.—We object on behalf of the crew that it is not binding on them, immaterial, irrelevant and incompetent, and hearsay. [50]

Mr. TULLY.—We make the same objection, and not intelligible in its present form, no foundation has been laid.

The COURT.—Overruled.

Mr. GILLIS.—This document is in a foreign language, but the jury can decipher enough of it to see it is for the boat "Giulia," which was formerly the "Frontiersman," and the proprietor or owner of it is Guyvan McMillan, of Vancouver, British Columbia.

(The document was marked U. S. Exhibit 2.)

Q. I show you two other documents, and ask you if these were taken from Captain O'Hagan at the time the other papers were taken?

A. Yes, these papers were all taken from Captain O'Hagan at the same time.

Mr. WILLIAMS.—If your Honor please, these are documents printed in a foreign language; I do not understand the language. We cannot even tell what they purport to be. There is nothing shown concerning the authenticity, and we can only guess at what they are until we have a translation.

Mr. GILLIS.—I do not think it would make any difference. It came from the captain of the boat.

Mr. WILLIAMS.—They do not mean anything, they are rank hearsay, as I understand the law, except the fact that they were taken, and they are an admission against the captain; they are not declarations. One paper has the captain's signature, but the rest of the papers do not.

The COURT.—They are papers taken from the captain. I think that would be competent evidence.

Mr. GILLIS.—The history of the ship is taken from that paper.

Mr. WILLIAMS.—I move to strike out these various records and papers that are in here, they are certificates of [51] officers of a foreign country, some of them we cannot read, we don't know what they are, they are not signed by any of these defendants on trial, and, to that extent, they are hearsay; there is no foundation laid in this, that the authority at law to execute such documents is not proven.

The COURT.—I do not think that is important in a case of this kind.

Mr. GILLIS.—It goes to the weight of the evidence.

Mr. WILLIAMS.—And then, furthermore, there is nothing shown that this man actually did sign these documents or papers.

The COURT.—I understand they are offered by

the Government as papers that the captain surrendered to the customs office.

Mr. GILLIS.—Yes.

Mr. WILLIAMS.—I make that motion particularly with reference to my client, Mr. De Maria. I move to strike out all of the testimony of the witness.

The COURT.—It is overruled.

Mr. WILLIAMS.—Note an exception.

Mr. GILLIS.—I ask that this be introduced in evidence and marked U. S. Exhibit next in order.

(The document was marked U. S. Exhibit 3.)

Mr. VINCILIONE.—The same objection, if your Honor please.

Mr. TULLY.—The same objection.

The COURT.—Yes.

Mr. GILLIS.—I show you another instrument and ask you if this was taken from Captain O'Hagan under similar circumstances as the other instrument in evidence? A. Yes.

Mr. GILLIS.—I ask that that be introduced in evidence and marked U. S. Exhibit next in order.

Mr. CONNOLLY.—The same objection. [52]

Mr. VINCILIONE.—The same objection.

The COURT.—The same ruling.

Mr. VINCILIONE.—Exception.

Mr. GILLIS.—It is a manifest of the steamer "Giulia," which lists the same number.

Mr. WILLIAMS.—If it is offered because it was gotten in the possession of this particular witness from Captain O'Hagan, all right, but if the United

(Testimony of H. S. Creighton.)

States Attorney is going to characterize it as a manifest, it is immaterial, irrelevant and incompetent, not admissible, because the courts have repeatedly held that manifests cannot be admitted in evidence unless the authenticity has been proven.

Mr. GILLIS.—It has written on it, "Manifest of cargo shipped on board steamship 'Giulia,' Captain John O'Hagan, at Havana, for Vancouver," and lists the same liquors that I read in the other instrument.

(The document was marked U. S. Exhibit No. 4.)

Q. I show you three pieces of paper with typewriting on them, and ask you if you recognize those sheets, Mr. Creighton?

A. Yes, these sheets came into my possession under the same circumstances.

Q. Under the same circumstances? A. Yes.

Mr. WILLIAMS.—This letter is written in Italian.

Mr. VINCILIONE.—If Captain Gillis will be good enough to let us see a translation, if there is one, we can tell whether or not it is worthy of any objection on our part. It appears that the original letter, if that is the original, is not signed by any person.

The COURT.—I do not think that makes any difference. This is only offered in evidence by the Government as being found on one of the defendants.

Mr. VINCILIONE.—We are going to ask for

what purpose? [53] It seems to me to have no connection with the charge made in the indictment.

The COURT.—I don't know whether it has any connection with this alleged crime, or not. . . . .

Mr. VINCILIONE.—The Court will decide whether it is material or not. It is difficult for us to know whether it is material, or not, there being no proof, for example, whether the person making these statements, whatever they are in the letter, had the authority to make them. It is a mere piece of paper.

The COURT.—I do not think that question is material at all. They were found in the possession of the captain, as I understand it. . . . .

The COURT.—As I stated a moment ago, I think it is competent against the captain; whether it will be against the other defendants will be dependent upon subsequent developments in the case.

Mr. GILLIS.—I offer the original in evidence and ask that it be marked Government's exhibit next in order.

Mr. CONNOLLY.—I object to its introduction on the ground it is immaterial, irrelevant and incompetent, not binding upon the captain, a defendant in this case, that it is an unsigned document, and not written in someone's handwriting, written on the typewriter, and written in a foreign language, and no *evidence it* was found on the captain's person at the time, or in his possession.

Mr. GILLIS.—It was taken with the other papers. The witness has stated it came to him in the same

(Testimony of H. S. Creighton.)

manner the other papers came, taken from the captain, and is addressed to one of the defendants in this case.

Mr. TULLY.—May I make the same objection on behalf of the client I represent, Mr. Campanelli?

The COURT.—Yes. [54]

Mr. WILLIAMS.—That goes as to all of the defendants?

The COURT.—That goes as to all of the defendants.

(The document was marked U. S. Exhibit 5.)

That thereafter the Government introduced as Exhibit 5 a letter written in the Italian language.

Mr. WILLIAMS.—I make additional point, if this paper was taken from the possession of the captain, it has no more value than any other piece of waste paper. It is an unsigned letter, purporting to be written to someone, the authenticity of the name of the writer or the person who may have dictated it is not shown, and I believe in view of that fact if that letter is offered in evidence at this time to affect in any manner the determination of this jury concerning any of these defendants, it would be improper to read that letter before the jury, unless something is developed to connect that letter with some conspiracy in vogue here. I think we ought to wait until something develops.

The COURT.—There is no translation of it now. It is only introduced as a paper that was found in the possession of the captain by the customs officer.

WITNESS.—(Continuing.) On or about the

(Testimony of H. S. Creighton.)

25th day of October 1924 I had a conversation with Captain O'Hagan of the "Gulia" and procured from him a signed statement. I made no offer of reward to Capt. O'Hagan at the time I procured the statement, nor did I make any suggestion or threat or pressure to induce the statement. It was transcribed immediately onto the typewriting machine and the original signed when completed. It was signed and sworn to by Captain O'Hagan. I was the agent who took the statement. Upon the day I procured the statement from the Captain I saw him early, at approximately 7 o'clock but he did not sign the statement until approximately 5 o'clock that afternoon.

Mr. CONNOLLY.—No, but I wish to bring to the attention of [55] the Court, the Government officer's statement; he wishes to make the Court believe a statement was given freely and voluntarily, and, therefore, if it is a confession, it is properly admissible [56] in evidence. However, from what I have learned from the captain, and from what I know of the case, the confession was given neither freely nor voluntarily, signed by the captain, nor was the captain in a real fit physical condition.

Mr. GILLIS.—If counsel wishes to take the witness-stand and testify, let him do so.

The COURT.—Let him cross-examine the witness.

Mr. CONNOLLY.—I will not argue it any fur-

(Testimony of H. S. Creighton.)

ther. Without the presence of the jury I would develop these facts from the witness.

The COURT.—You can ask the witness now.

Mr. CONNOLLY.—Q. Captain Creighton, what date did you first see Captain O'Hagan?

A. October 25, 1924.

Q. At what hour in the day?

A. Early in the morning, approximately 7 o'clock.

Q. At what hour in the day did he sign this alleged statement?

A. Late in the afternoon, approximately five o'clock.

Q. Were you with him throughout this time?

A. I was with Captain O'Hagan continuously from the time I first met him until he signed the statement.

Q. Is it not a fact that you were importuning him or requesting him to make a statement or admission as to his connection with an alleged boat carrying liquor?

A. I questioned him during this time.

Q. State, from your own observation, what the physical condition of Captain O'Hagan was at that time. A. I made no examination of him.

Q. Did he not state to you that he had been without food and water for some week or so?

A. No, because he had been on board a ship that was well victualed and was properly found.

Q. He stated it was not well victualed, did he not?

A. He came in on a ship properly founded. [57]

Q. The ship that unloaded him, or from which he

(Testimony of H. S. Creighton.)

disembarked, was properly victualed: Is that correct? A. Yes.

Q. Is that the ship on which he came originally?

. . . .

Q. Was he in your custody at the time this statement was made?

A. I met him at what is known as Meiggs Wharf. At that time he was on board the revenue cutter. I rode with him on that boat up to one of the piers, more nearly, probably Pier No. 5; we came ashore there, and together we walked up town, had some breakfast and went over to the customs-house.

Q. As a matter of fact, he was under arrest, was he not? A. He was not under arrest.

Q. He imagined he was under arrest?

A. What his imagination was I don't know.

Q. Could he have left your custody without your permission? A. He made no attempt to.

Q. Could he have left your room freely and voluntarily and gone about his business without your permission?

A. I would not have permitted him to.

Q. Then you had him in your custody, did you not?

A. I exercised no control of that sort over him.

Q. You would not have let him get out of the room, would you? A. No.

Q. He knew that?

A. What he may have known I do not know.

Q. At any rate, you would not have let him get out

(Testimony of H. S. Creighton.)

of your clutches. What did you state to him at the time you asked him to make this statement?

A. There was no formal statement to him on the boat. . . . .

Mr. CONNOLLY.—I am trying to bring out from this witness how the confession was obtained, and instead of the witness hedging I think he ought to answer freely and voluntarily. . . . . [58]

Q. Who prepared the statement?

A. I did the typewriting.

Q. Did you read it to him?

A. It was read over line by line to him, and he read it over himself, and carefully studied it before he signed it.

Q. The signing, though, was about five o'clock in the afternoon?

A. The signing was late in the afternoon.

Q. I do not wish to take up the Court's time, but I want to bring this out: Did you state the formal words that you have already uttered to Captain O'Hagan when you first started to interrogate him, that is, the formal words *tha,* "You are under oath, and this will or may be used against you"?

A. At the time I met Captain O'Hagan on the cutter I did not. At the time this statement was prepared this statement was started on it. . . . .

Mr. CONNOLLY.—He stated he was continuously in the presence of the captain from early in the morning till late in the afternoon. The statement was signed late in the afternoon, and I am trying to show that he did not say these things to

the captain, at the first time he interviewed him, but did so at a late time in the afternoon so that he could testify to it on the stand, and that the captain did not voluntarily make this statement. I want to lay the foundation so that I can object.

The COURT.—You have gone far enough, I think.

Mr. CONNOLLY.—Do you restrict my cross-examination?

The COURT.—I think you have gone far enough to show it was a voluntary statement.

Mr. CONNOLLY.—I make the objection that the confession was not voluntary, and, therefore, inadmissible.

The COURT.—Overruled.

Mr. CONNOLLY.—Exception. . . . .

The COURT.—If the statement involves anybody else, [59] it is not competent evidence against them unless they are subsequently connected with the conspiracy.

Mr. WILLIAMS.—If this witness was testifying, as he proceeded to testify, to things that were not binding on the captain or anybody else involved, we would then object to them, and they would stay out, but if you read a lengthy statement here, which might, as I say, involve a great number of other persons—without having seen it, I don't know—manifestly, something will go before the jury that does not belong there.

The COURT.—Haven't you seen the statement?

Mr. WILLIAMS.—No.

(Testimony of H. S. Creighton.)

The COURT.—Haven't you submitted it to the other side?

Mr. GILLIS.—No. The Government is not required to show statements that are given to Government agents. The decisions uphold the Government in that respect.

The COURT.—When you offer it in evidence you must show it to counsel on the other side.

Mr. GILLIS.—Certainly, when we offer it in evidence we will have it read.

The COURT.—They have a right to see it before it is read.

Mr. GILLIS.—If they want to see it after it is read, all right.

The COURT.—They have a right to see it before it is read. I thought it had been submitted to counsel. . . . .

Q. Is it not a fact, Mr. Creighton, that you gave the captain to understand you would be assisted materially in this trial, or that the Government would, if he would tell about it and get the other defendants?

A. I did not make any such statement.

Q. You don't remember very clearly, do you?

A. I do remember very clearly.

Q. This is the last question I will ask you: Then, as I understand [60] it, the captain told you everything freely and voluntarily, without your urging him to do it, or without your taking advantage

(Testimony of H. S. Creighton.)

of his physical condition, or without any promise: That is your statement, is it not?

A. Without any promise, assuredly.

Q. Mr. Creighton, what you understand by a promise, technically and legally, may not be what the captain, in the ordinary way, understood by a promise. Would you say now that he did not think he was going to be granted some favors at your hands? A. What he thinks I don't know.

Mr. TULLY.—May it please the Court, may I make the formal objection with reference to that statement that it is immaterial, irrelevant and incompetent, the proper foundation has not been laid, it does not tend to prove any of the issues set forth in the indictment, and it does not bear in any way on the conspiracy itself.

Mr. McDONALD.—The further objection that this statement was made after the arrest of the defendants, and the conspiracy was terminated, and it is purely inadmissible against any defendant except the defendant making the statement.

The COURT.—The jury will understand that this statement, whatever it is, is evidence against the captain, only, and if there is anything in it that implicates anybody else, that it is not evidence against the other people, but only against Captain O'Hagan, because it was made after the conspiracy had terminated, and, of course, a declaration at that time could not implicate somebody else in a conspiracy; otherwise, there would be no protection for an innocent person.

Mr. CONNOLLY.—The testimony of the witness was that it was made under his supervision. Might I ask if it was signed in your presence?

A. Yes. [61]

The COURT.—The captain's statement mentions other names, but it is understood, and the jury will understand now, that any declaration in that statement implicating anybody else is not evidence against the other parties, and will not be considered by them as such.

Mr. McDONALD.—I would ask in the interest of the other defendants, whose names may be mentioned, that those names be deleted at this time, and not read.

The COURT.—No. They may be read.

That thereafter the witness Creighton read the statement of defendant O'Hagan as follows: [62]

"San Francisco, California, October 5th, 1924.

"CREIGHTON.—State your name.

"Answer.—John O. Hagan.

CREIGHTON.—Mr. Hagan, I desire to question you concerning certain matters being investigated by the United States Customs Service. I will advise you that your answers are being made under oath; made without any promise of reward or immunity and without any pressure of threat or duress.

"Being first duly sworn the following answers were made by John O. Hagan in response to questions by Customs Agent H. S. Creighton, in the presence of Customs Agent E. E. Enlow.

(Testimony of H. S. Creighton.)

"Q. State your age, residence and occupation or employment.

"A. Age, 33—residence 52 Guelph Street, Kensington, Liverpool, England. Am a Ship Master."

It has been corrected by Captain O'Hagan to eliminate the words "Am a," and initialed on the margin to show he made the alteration in his statement, both initials; the original writing was "Am a Ship Master." . . . .

Mr. CONNOLLY.—If your Honor please, I ask that the witness read the statement as it is now and not as it was originally.

The COURT.—Yes.

A. (Continuing.) Ship Master.

"Q. At the present time how are you or have you recently been employed?

"A. Since the latter part of April, 1924, I have been employed by Mr. Guyvan McMillan of Vancouver, British Columbia, as the master of the ship—which is now the 'Giulia.'

"Q. What other name has this ship had while you have been master of her?

"A. At the time she was purchased by Mr. McMillan she was the British ship 'Frontiersman'—on May 24th, 1924, I sailed with her from Los Angeles, California—the Panamanian Consul [63] in Los Angeles, California, granted her a provisional register, under which I took her to Panama City—where she was granted a permanent register under the flag of Panama. At the present time she is still under that register—her register being number 373.

"Q. From Panama City to what point did you take this ship?

"A. From Panama—through the canal to Colon—coaled in Colon and proceeded to Havana, Cuba.

"Q. Where and when did you see Mr. McMillan?

"A. The first time I ever met Mr. McMillan was about the middle of April, 1924—when I met him here in San Francisco—outside of the British Consulate. I met him that time by appointment. Then during the next two or three days I saw him once or twice here in San Francisco. I think he had at that time already been to Los Angeles and effected all negotiations for the ship. About one week or ten days after I first met Mr. McMillan I went to Los Angeles and took charge of the ship. Prior to going to Los Angeles he had engaged me as Master.

"Q. After you went to Los Angeles what was the next time that you saw Mr. McMillan?

"A. About ten days afterwards he came down from San Francisco. He remained in Los Angeles or San Pedro—which is the port at Los Angeles—until we sailed.

"Q. Have you seen Mr. McMillan since that time?

"A. Never.

"Q. At Havana, Cuba, what cargo did you take on board the 'Guila'?

"A. Referring to the papers which I have—I think the best record of this cargo is found in the ship's manifest. This reads as follows:

" 'Anglo Cuban Steamship Company.
Glasgow—Havana—Cuba.
'A. C.

Manifest of cargo shipped on board S. S. 'Giulia' Captain John O'Hagan at Havana for Vancouver.
No. 1— Date of sailing 7th, July, 1924.

Item:	Shippers:	Consignees:	Destination:
1	Anglo Cuban S. S. Company as Agents	order in transit for Hong Kong.	Vancouver

Goods.	Marks and	Weight
[64]		
6223 Pkgs. Whiskey)	Numbers.	T. C. Q. x lbs.
400 " Gin)		
40 " Rum)		
265 " Wine)		
65 " Brandy)	L. H.	
223 " Liqueurs)		
200 " Champagne)		
2 cases cigars.)	Vancouver in transit	

179.
17.
3.

E. & O. E.
ANGLO CUBAN STEAMSHIP COMPANY,
(Signed) J. S.

7/7/24?

"Q. What if anyone representing the owners of either your ship or cargo did you meet in Havana?

"A. In Havana I met Mr. Leonard Holmes—and a Mr. Stevens, whose initials I am not able to give correctly at this time but his initials may be 'J.' and a man from San Francisco that they called 'Joe' Campanelli.

"Q. Do you know whether or not this is Ricardo Campanelli who resides at 1757 Chestnut street, San Francisco?

"A. I do not know what his residence is—I met him here in San Francisco." . . . .

Mr. TULLY.—May I interrupt to have the name "Campanelli" stricken out?

The COURT.—The motion will be overruled.

Mr. TULLY.—Exception.

A. (Continuing.) "After I met Mr. McMillan, I then met Campanelli at 17 Columbus Street. I met them there probably three or four times. At that time I was looking for the job as master of the ship which I had learned McMillan had just purchased. Later Campanelli came to Los Angeles with McMillan, and they were around there together until I sailed. [65]

"Q. Before McMillan and Campanelli left Los Angeles—who directed you to proceed to Havana?

"A. Mr. McMillan.

"Q. At the time you left Los Angeles was there any arrangements made that Campanelli should meet you in Havana?

"A. That was the arrangement and my instructions from Mr. McMillan. I was to proceed to Havana where I should be met by Campanelli. There I was to take on such cargo as Campanelli directed.

"Q. Then it was under that arrangement that you met Col. Holmes, Stevens and Campanelli?

"A. Yes. I don't know whether or not this Mr. Holmes is a Colonel or not but they called him 'Colonel.'

"Q. You had never previously seen this Mr. Holmes or Stevens previously? A. No.

"Q. Judging from their conversation with you or

in your presence are McMillan and Stevens from San Francisco or familiar with San Francisco?

"A. I would judge that they are not familiar with San Francisco. They may be Scotch or something of that kind.

"Q. Then they represent the 'Scotch' end of this deal you think? A. I don't know—maybe.

"Q. Do you recall the date of your sailing from Havana?

"A. My manifest is dated—July 7th, 1924—I sailed on that date.

"Q. What was the destination for which you sailed?

"A. I think first I better call your attention to the special clause which appears in my copy of my bill of lading. This reads as follows: Above reciting the details of the cargo as quoted above from the manifest the following clause was written into this bill of lading:

"'Consignees to have the option, weather permitting, to take delivery on the HIGH SEAS, but in no case and under no circumstances is delivery to be made within TWENTY MILES of any territory and then, only on the PACIFIC COAST within a radius of a line drawn due west of SAN DIEGO and a line due west of SEATTLE, always at least TWENTY MILES from such described coasts or territories. All island territories within this described area to be taken as the measurement [66] point for such delivery, if made, in order to conform with the recent treaty made between Great

Britain and U. S. A. ALSO, should the maximum speed of any vessel taking delivery be more than fifteen knots per hour, such excess speed must be added to the delivery distance from the within described area.'

"Q. Leaving Havana, Cuba on July 7th, 1924, to what points did you sail the 'Giulia'?

"A. Through the Panama Canal to Mazatlan, Mexico. Was there about ten days more or less. Referring to the clearance granted me at Mazatlan, Mexico, I will say that I anchored first at Mazatlan on August 5th, 1924, and sailed from there on August 11th, 1924.

"Q. For what purpose did you stop at Mazatlan?

"A. For fuel.

"Q. Under what arrangements did you secure fuel—also what class of fuel does the 'Giulia' use?

"A. We use only coal for fuel. First I believe I should state that I had on board a man by the name of 'J. Gerbaudo' that I usually called 'Joe.' This man was on the articles as 'Contador' or purser. He came down from San Francisco to represent *to* owners on board the ship. He signed on at Los Angeles and that was the first place I saw him. He came down with a number of the crew. Looking at the crew list I will say that he came down with the following:

"F. Janeo" who is signed as a 'Marinero'

J. Mossino who is signed as a do,

Roberto Castagno who is signed as a Fogonero, or fierman.

"When I left Havana it was my arrangement with Campanillo that I was to cable back to him at Seville hotel at Havana—the correct name of this hotel was the 'Seville—Biltmore'—Campanillo had been stopping there with Holmes and Stevens. Now it was through Gerbaudo that I notified Campanillo at Havana of our arrival at the Canal. This cable was sent from Colon. We went on through the Canal and to Panama Bay and while there there was a boiler explosion on board which required some repairs and we exchanged further cables between us and Campanillo at Havana. Am not sure but think that we [67] had to get some money ashore there at Panama City to pay for these repairs and other expenses.

"Q. When you left Panama was it your intention to stop at Mazatlan, Mexico, or were you forced to go into there for fuel?

"A. I had cleared from the Canal for Mazatlan but I would have been compelled to go into there for fuel.

"Q. While you were in Mazatlan did you communicate with either of your owners?

"A. Yes, we had to have money authorized to pay for coal—when I got into there I sent a cable to Campinello here in San Francisco but did not get an answer to this. Gerbaudo also sent cables and the result was that we finally had $3,500—remitted to us there. We purchased our coal from the railroad company there at a cost of $75.00 per ton. There was several days delay in getting this

money and the coal but it was finally arranged. While we were there waiting—on two different occasions we had to go outside of the harbor because of those northern winds down there.

"Q. After you left Mazatlan, Mexico, to what point did you proceed?

"A. Under instructions from the owners, received through Gerbaudo I proceeded North and cruised around a point thirty miles west of the Farallone Islands—it was my instructions that I should proceed to a point thirty miles off Half Moon Bay and that there would be a boat meet me there with instructions.

"Q. What date did you arrive off the Farallones?

"A. When I left Mazatlan I expected to be off the Farallones in about ten days. I left there on August 11th, and as I recall it it was August 22d, 1924, before I arrived off Farallones. I arrived out there in a fog and hung around there two or three days waiting for communications from shore—I was then getting short of fuel and had to go back to Ensenada, Mexico, for fuel.

"Q. You had no wireless or other means of communicating with the shore on board the 'Giulia'?

"A. No, we had no wireless. [68]

"Q. How did you manage to get back down to Ensenada if you had no fuel?

"A. We had some fuel and I also used my sail in getting back down there—I also burned my boat deck and stairways for fuel getting down there.

"Q. How long did it take you to get back down to Ensenada?

"A. This was about the 1st, of September, 1924. I believe I was there three days and sailed Sept. 3d, 1924. It took me about seven days to get back down to Ensenada.

"Q. Then how did you communicate with San Francisco?

"A. Getting back down as we were outside of the 'Los Coronada' islands I spoke a ship and asked them to send a *cable McMillan* at San Francisco advising them that I had to go into Ensenada for fuel. It is my opinion that they did not send this cable.

"Q. What address in San Francisco did you give for the delivery of this message?

"A. 17 Columbus Ave.

"Q. Why did you not come into San Francisco for fuel when you were only a short distance off shore?

"A. When you have a cargo like that you don't want to attract any more attention than you have to.

"Q. It is the information of the United States Customs Service that you were met at Ensenada, Mexico, by Campenillo, and John B. Demaria and another man, all from San Francisco. This is correct, is it not?

"A. As soon as we cabled from Ensenada Campenillo and another man who may be related to

Campenillo but whom I do not know the correct name for—they came down.

"Q. What is the name that this man was called by that came with Campenillo?

"A. Campenillo is a man about 26 or 27 years of age and this other man is about the same age. As near as I can give the name they called him by it was 'Ricon.'

"Q. Then the third man Demaria when did he come?

"A. I do not know this man by the name of Demaria—in fact I do not believe I heard his name at all. However there was another man that came down. [69] The name of this man may be Demaria but of this I am not certain; I have heard that name but was not introduced to this man at Ensenada by any name. My recollection is that he came down the next day after Campenillo and Ricon and I only saw him around there that one day. My recollection is that this third man came out to the ship and was on board only a few minutes and then later I met him on shore with Campenillo and Ricon and we all four had some drinks there together on shore.

"Q. In what manner did you go about getting your fuel at Ensenada?

"A. I waited until Campenillo and these others came down and they made all arrangements. I reported to them that I was out of coal and when they came down they made all arrangements and the 'Gryme' brought me seven hundred sack of coal.

"Q. Did they bring you other supplies of any kind on the 'Gryme'?

"A. As I recall I bought some food there at Ensenada but the 'Gryme' did not supply me with any.

"Q. Leaving Ensenada—what was your instructions as to where you were to proceed to?

"A. This time I came to a point off the Farallones Islands—this point was to be in accordance with my instructions in my bill of lading that is to be outside of certain limits from shore. The coming to the point off San Francisco was in accordance with my instructions received by cable while in Mazatlan. Before I left Havana it was agreed that I should receive instructions from San Francisco as to the point where I was to stop—that is with respect to the point I was to be opposite of and I was to see that it was outside of certain limits as I have said.

"Q. Before you left Ensenada—it is our information that Campenello advised you that you would have a boat communicate with you from shore as soon as you took up this position off the Farallones. Is this correct?

"A. Not entirely. I advised Campenillo that it would take me approximately three days to come [70] up and it took me three and a half days. Then the following morning there was a small boat came to me. I could not say that this boat came to me from shore or as to where it came from.

"Q. What type of boat was this that came to

you next morning and do you know the name of it?

"A. It was a boat probably thirty feet long. I don't know the name of it. I believe it had a number and I did not notice a name.

"Q. How long did you remain off the Farallones?

"A. Was there until the 8th of October when I ran out of fuel and commenced to drift south.

"Q. Then you were out there off the Farallones more or less thirty days?

"A. About that I kept cruising up and down in that general vicinity.

"Q. During this thirty days did this same boat return to you at other times?

"A. For about nine days before I started to drift south I was out there in very heavy weather and during that nine days none of these boats came out to me—nor during the following sixteen days when we were actually drifting. Prior to that this same boat came back probably three times.

"Q. Each time you loaded on to this boat from your cargo various quantities of liquor. Is this correct?

"A. The first time we it took approximately three hundred cases, and on each other voyage she took more or less the same quantities.

"Q. There were also other boats of a similar type that came to you and took from your cargo quantities of liquor?

"A. I believe only this and one other one that came to us and took liquor from our cargo. I

cannot give you the name of this second boat either.

"Q. Our information is that the boat 'Shark' came out to you and brought you coal and other supplies. Is that correct?

"A. About Sep. 24th, 1924, a boat brought us out about seventy tons of coal. I think the name of this boat was the 'Shark.' They [71] brought us no other supplies. She did put some water aboard us with a hose.

"Q. Your documents show that you left Havana with a crew of eighteen men including yourself. The S. S. 'Brookings' picked you up yesterday in two life-boats—at this time there were only yourself and twelve other men from your crew. What became of the other members of your crew?

"A. Mariano Rigada, who was a Marinero, died from some kind of stomach trouble—probably gastritis, on September 13, 1924. He was buried at sea. This was the day after we arrived off the Farallones from the south. Before we left Ensenada he was treated by Dr. Morales at that port.

"On Sept. 14th, 1924, the man J. Gerbaudo left the ship. He went off on one of these boats that had taken a cargo of liquor.

"On September 19th, 1924, the man F. Janeo, also left the ship on one of these boats that had taken a load of liquor from us.

"About one week before the crew left the boat—we were in distress—and P. J. Walsh and H. M. Cummins volunteered to take a small boat and

undertake to get back on the path of the ships that travel this coast. We had drifted probably sixteen or seventeen miles off shore—ordinarily ships going down the coast can keep within three miles of shore and I was well to the west of that.

"Walsh and Cummins volunteered to see if they could get back in a small boat and get us assistance. I have not seen or heard of them since.

"The balance of the crew I brought in with me. On October 24th, 1924, we had been in distress now for twenty-five days—for the past eight or nine days the crew had been determined to leave the ship. We were entirely out of fuel—and at the very last of our food—and in addition the fresh water was almost out and they were insisting that we abandon the ship.

"Yesterday morning, October 24th, 1924, we opened the seacocks— [72] and the bulkhead doors and about 7 A. M. left the ship in two lifeboats. About 11 A. M. we were picked up by the S. S. 'Brookings' and brought into this port on board her.

"I have read the above statement before signing same and this is a true and correct statement made without reservation.

"JOHN O'HAGAN.

"Subscribed and sworn to before me this twenty fifth day of October, 1924.

"H. S. CREIGHTON,
"Customs Agent.

"Witness: E. E. ENLOW.

"CREIGHTON.—Supplementing the statement which you have just completed and signed above I would like to ask one more question"—

Mr. CONNOLLY.—This latter portion is signed by Captain O'Hagan? A. Yes.

"Can you state the number of cases of liquor which were left on board the 'Giulia' yesterday morning when the crew left her?

"Answer. From my information from the purser and mate there were five thousand two hundred and eighty cases of liquor left on board her.

"JOHN O'HAGAN." [73]

The following is a photostatic copy of a Government exhibit purporting to have been executed in a foreign language.

1834

No 378.

REPUBLICA DE PANAMA

MINISTERIO DE HACIENDA

Patente de Nacionalizacion del buque a vapor "GIULIA"

EL SUSCRITO JEFE DE LA SECCION DE INGRESOS DE LA SECRETARIA DE HACIENDA Y TESORO

CERTIFICA:

Que el señor doctor Juan B. Morales ha registrado ante el Inspector Jefe del Resguardo Nacional de este puerto de Panamá, una nave de propiedad de Guyan Mc.Millan, de Vancouver, B. C., Canadá,-mestre-del-mismo lugar, mayor de edad, soltero y comerciante.-

Dicha nave es de una hélice, una cubierta y dos mástiles y tiene las siguientes dimensiones:

Eslora 169 8/10 Manga 24 1/10 Puntal 14 25/10 Toneladas de registro 251.-

Nombre y nacionalidad anterior de la nave "[illegible]", inglesa.

Por tanto le expido esta PATENTE, por lo que se tendrá como nave panameña

Dado en Panamá a 11 de Junio de 1924.

El Jefe de la Seccion de Ingresos

Registrada en la Inspección del [illegible]

Puerto bajo el numero 18.

Ernesto S. Arosemena

3.º

13 Junio

OFICINA DE REGISTRO PUBLICO
PANAMA

Presentado este documento a las 9 a. 5.2 m.
del 13 de Junio de 1924 Tomo 11
Folio 247 asiento 1834 del Diario
por Juan R. Morales

Inscrito el documento anterior en el Registro de Naves, bajo el Nº 431

Tomo 29
Folio 470
Asiento 1
Derechos: B/. 3.00
Panamá, Junio 14 de 1924

Jefe de la Seccion de Panama

1382

1925

(Testimony of H. S. Creighton.)

Mr. CONNOLLY.—At this time we will move to strike out the testimony on the ground that it is immaterial, irrelevant and incompetent, the proper foundation has not been laid.

The COURT.—It is only admitted against the captain. . . . .

WITNESS.—(Continuing.) After I procured the statement from Captain O'Hagan I interviewed two members of the crew, Mr. Daniell and Mr. Rodney, who are also defendants in this case.

Mr. VINCILIONE.—I assume that all of the objections that were made before to the introduction of the statement of the captain *of the captain* will apply to the introduction of any statement made by Mr. Daniell or Mr. Blackmore. I further object on the ground that it is not the best evidence, that the two men are here present in court, and that these statements made to Mr. Creighton could only be used as a matter of fact as a declaration against interest, if there is any difference between the testimony obtainable by the Government and this hearsay testimony. This is secondary testimony, as a matter of law.

The COURT.—Are these two parties under indictment?

Mr. VINCILIONE.—Yes, they are here, I submit that if your Honor please.

The COURT.—Objection overruled.

Mr. VINCILIONE.—Exception.

(Testimony of H. S. Creighton.)

Mr. TULLY.—May we make the same objection to this statement as made to the others.

The COURT.—Yes.

I questioned Daniell and Rodney while they were in custody at Angel Island, held by the Immigration authorities. The last time Daniell was questioned was February 14, 1925. Mr. Enlow, the custom agent, was present when I questioned the defendant O'Hagan, and the defendants Daniell and Rodney. I took the statement of Daniell and Rodney on November 29, 1924. Neither Rodney or Daniell signed the statement. [75]

WITNESS.—(Continuing.)

The COURT.—State what Daniel told you, not your conclusions at all.

A. I am following it too close. The statement of Daniell was that when Dietrick left the boat at Mazatlan Captain O'Hagan was very elaborate in saying farewell to him, and advising him to keep under cover and not get caught. When the boat left Panama Dietrick apparently was of the opinion that the ship was going through to Vancouver without stopping in the United States, and at Mazatlan he concluded that possibly he should not stay with the ship, for fear it had to go into some American port and he would be picked up., At Mazatlan the captain spent most of his time in company with the British Vice-Consul; during this time they were both in a badly intoxicated condition.

(Testimony of H. S. Creighton.)

As they were leaving Mazatlan, in addition to payments of money made to various port officers, the captain sent the British Vice-Consul and others a supply of liquor. It was Daniell's opinion that—

The COURT.—State what he said—state what Daniell said.

A. Daniell said that it was his recollection that the day that Henderson and the woman came to the ship was September 14; he was uncertain about the exact date, however, this also being the date that Joe Gerbaudo quit the boat and came ashore. Henderson and the woman, Patricia, came out to the ship in a boat where the crew was two Americans. The boat which brought them out did not have a name, but was numbered, as he recalled. The boat was painted a very dark green, and the numbers were lettered on in white paint. The crew consisted of a boy about 18 years of age, called Frank and another man 32 to 36 years of age, called Louie. Louie wore a wooly or hairy sweater. On the day that Henderson and Patricia came out the boat which brought them back took a load of liquor, and Patricia went ashore with them. About eight days later Patricia again came on board the ship, arriving in the same boat with Louie and Frank, and this time she came aboard and remained about 12 days. The boat which was operated by Louie and Frank was on several [76] occasions accompanied by a smaller white fishing boat, and it was on this boat that Henderson and Patricia

(Testimony of H. S. Creighton.)

finally went ashore. On the day that Henderson and Patricia went ashore on the white fishing boat, the boat first came to the "Giulia" and took Henderson and Captain O'Hagan with them over to the "Quadra." When Henderson and O'Hagan returned to the "Giulia," the white fishing boat then had a load of liquor aboard, and Henderson and Patricia came on to the shore on that boat. Using the time referred to above, Henderson arrived on the "Giulia" approximately September 14, and remained 8 days, until Patricia again came out and continued there about 12 days. This would bring him up to about October 4. These dates are all from memory, on the part of both Rodney and Daniell.

Mr. TULLY.—Are you reading Daniell's statement or a joint statement now? I mean, are you testifying as to the Daniell statement, or both?

A. This memorandum here reads both Rodney and Daniell agree as to that feature of the memorandum.

Q. Can you tell without making those remarks whether it was Rodney or Daniell?

A. This is the statement of Daniell.

Q. What are Rodney's remarks in there? Have you come to them?

A. I will separate them, or undertake to do so. . . . .

Mr. TULLY.—We would like to know who is speaking.

(Testimony of H. S. Creighton.)

A. I am undertaking to quote Daniell. The mate, Paddy Walsh, would usually attend to the checking off of the cargo, although while Henderson was on board he would direct this operation.

The mess-boy, Castagno, waited on the table for Henderson and Patricia, and cared for the saloon where they were living, and he probably can verify the going and coming of this woman. The white fishing boat brought one load ashore from the "Giulia." At that time this boat came in company with that boat operated by Louie and Frank. There was only one man on board the white boat. He spoke English; approximately 30 years of age; wore high-laced boots, and riding pants. [77]

Joe and Ricardo came to the Farallones on board the "Giulia," and a launch brought them ashore. There was some doubt on the part of Daniell—

Mr. TULLY.—We move to strike that out. He should state what was said.

The COURT.—Yes.

A. This is a statement that Daniell said, he said he was in doubt about the next statement—I don't know whether that is proper.

Q. Yes.

A. He said that he was in some doubt, but it might have been Louie that brought Joe and Ricardo ashore. When Joe came ashore he wore

(Testimony of H. S. Creighton.)

a .38 pistol and a belt of cartridges strapped around his waist.

Ricardo, Campanellis and two others came on the "Nat" with the provisions. After the conditions on the "Guilia" became so bad, the crew finally stole all the weapons the captain had and threw them overboard. Daniell was not able to identify either the "Mallhat" or "Quadra" by name. He referred to them as a five-mastered schooner and another ship.

The statement of Rodney was to the effect that after Henderson was on board the ship Rodney had signed a receipt to Henderson for $50.00 wages and had requested that Henderson transmit this money to Rodney's wife, Miss Merzelin Simonds, No. 70 San Ysidro Street, Havana, but Rodney had heard nothing from that remittance. That the woman Patricia came to the "Giulia" first probably September 14, this being the estimated date that Joe Gerbaudo quit the boat and went ashore. They came in a boat with a crew of two Americans; the boat had no name, but was numbered. Recall that there was a cipher in one of the middle numbers of the boat. The boat was painted dark green, and the numbers were lettered on in white. The crew of this boat consisted of one boy about 18 years of age, called Frank, and the other a man 32 [78] to 36 years of age, called Louie; Louie wore a wooly or hairy sweater. The day Henderson and Pa-

(Testimony of H. S. Creighton.)

tricia came out the boat that brought them out took back a load of liquor, and Patricia went ashore with them. About 8 days later Patricia again came on board, arriving in the same boat with Louie and Frank, and this time she came aboard and remained probably 12 days. The boat operated by Louie and Frank was on several occasions accompanied by a smaller white fishing boat, and it was on this boat that Henderson and Patricia finally went ashore. On each day they went ashore in this white fishing boat the boat came first to the "Giulia" and took Henderson and Captain O'Hagan with them to the "Quadra" where they went on board. When Henderson and O'Hagan returned to the "Giulia," the white fishing boat then had a load of liquor on board, and Henderson and Patricia came on to shore on that boat. Using the above, Henderson arrived on the "Giulia" approximately September 14, and remained there 8 days, until Patricia came out, and continued there about to the 26th. This would bring him up to about October 4. These dates are all from memory on the part of Rodney. The mate Paddie Walsh would attend usually to the checking off of the cargo, although while Henderson was on board he would direct this operation.

The mess-boy, Castagno, waited on the table for Henderson and Patricia, and cared for the saloon where they lived. He could probably ver-

(Testimony of H. S. Creighton.)

ify the going and coming of this woman. The white fishing boat only brought one load ashore from the "Giulia"; she came then in company with a boat that Louie and Frank were operating. There was only one man on board the white boat. This man spoke English, and he is described as approximately 30 years of age, wore high-laced boots, and riding pants, was the size of Louie, but stouter. Rodney said that he could identify John de Maria having been on board the "Giulia" in Ensenada, with Joe Campanelli, [79] and the man whom Joe called his cousin. Joe and Ricard came to the Farallones on board the "Giulia" and a launch brought them to shore. There is some doubt on the part of Rodney but this may have been Louie who took them to shore. When Joe came ashore he wore a .38 pistol and a belt of cartridges strapped around his waist. Later the "Nat" brought out provisions, consisting of the following provisions, potatoes, canned milk, Armour's bacon and corned beef, oranges, apples, flour, celery, tomatoes, cabbages, eggs. Ricardo, Campanelli and two others came on the "Nat" with the provisions. At this time they took no liquor back with them, but soon afterwards they brought some coal, and on that voyage and each other time they took back liquor ashore with them. There was some uncertainty on the part of Rodney, but he believes that Joe Campanelli came out one time later on the "Nat,"

(Testimony of H. S. Creighton.)

but he did not remain, he went right back ashore with a load of liquor. Rodney was of the opinion that the man referred to as being the only man on the white fishing boat came out with the "Shark" when she brought some coal. While off San Francisco the captain and purser, Joe Gerbaudo, said the Mexican authorities had changed the ship's papers, so that they could not go to Vancouver until the cargo had first been discharged. When they were first taken on board the "Brookings," Captain O'Hagan told Rodney and other members of the crew that they were *no* going to San Francisco, and would have to face the court; that they must not, under any circumstances, admit that the "Giulia" had been loaded with liquor, or that any of the launches from ashore had been alongside. They had a Winchester machine gun on board which at times was mounted forward, and again aft. It was fired two or three times by Gerbaudo, but apparently only as a test. There were about six long-range rifles on board, and when any launch would show up the Spanish members of the crew were ordered to arm themselves and take certain designated [80] positions until the identity of the launch was determined. After conditions on the "Giulia" became so bad, the crew finally stole all the weapons the captain had and threw them overboard. In Havana, Joe Campanelli said to Rodney he was the boss of this ship, and

(Testimony of H. S. Creighton.)

again in Ensenada, when Rodney complained of the treatment he had been receiving at the hands of Captain O'Hagan; it was at this time that Joe Campanelli said he was the boss of the ship, and he would see that the captain was required to treat him all right. Rodney was not able to identify the "Malahat" or "Quadra" by name, but referred to them as the five-masted schooner and another ship.

Mr. WILLIAMS.—If your Honor please, at this time I ask for an order from this Court instructing the jury to absolutely disregard the statements which have been read here in evidence, and have manifestly been read in evidence by this witness, because he did not read this statement for any improvement of his recollection—he could not have been asked with relation to the visit of De Maria at Ensenada, he could not have been asked that parole question without argument, and I assign it an absolute misconduct on the part of the district attorney, and I think the jury ought to be instructed in regard to it.

The COURT.—The jury will understand that these statements are only evidence against Daniell, and Rodney, and not anybody that he mentions in the statement. That is all they are.

Mr. GILLIS.—That is all they are offered for.

Mr. TULLY.—For the purpose of the record, I make the same objection.

WITNESS.—(Continuing.)

(Testimony of H. S. Creighton.)

Mr. GILLIS.—I show you a book and ask you if you recognize that book? A. Yes, I do.

Q. Was that one of the books that was received from Captain O'Hagan [81] similar to other ship's papers that were taken from him?

A. This book was turned over to me at the same time by Captain O'Hagan.

Mr. GILLIS.—I ask that the book be introduced in evidence and marked Government's exhibit next in order.

Mr. TULLY.—We make the objection that it is immaterial, irrelevant and incompetent, the proper foundation has not been laid, it is hearsay, the handwriting has not been proved, there is nothing here to show its materiality in any sense, whatsoever.

The COURT.—What is it? What does it purport to be?

Mr. GILLIS.—The purport of it is a record of the ship's transactions, and members of the crew, showing the members of the crew and payments to them.

The COURT.—What were the ship's papers, part of the ship's records?

Mr. GILLIS.—Part of the ship's papers; it runs from April 15 to June 20; it shows a record of the ship.

The COURT.—It will be admitted then.

Mr. TULLY.—Just a moment before your Honor

(Testimony of H. S. Creighton.)

makes a ruling. That is a mere statement on account of counsel; he has not proved the identity of that book.

The COURT.—He got it from the captain, though.

Mr. GILLIS.—Yes.

The COURT.—The captain turned it over to the customs officer.

Mr. TULLY.—Suppose there were any other paper, is it admissible proof because it was taken from the person of the captain? There is only one person as to which counsel wants to introduce that book, and that is not to prejudice the captain, at all, but he desires to prejudice another defendant.

Mr. GILLIS.—You are stating the purpose of the district [82] attorney. I will take care of that.

Mr. CONNOLLY.—On behalf of the captain I make the further objection that it is a violation of the constitutional guarantee guaranteed to him under the Fifth amendment of the Constitution.

The COURT.—Objection overruled.

Mr. CONNOLLY.—Exception.

The COURT.—You can have an exception.

Mr. GILLIS.—I desire to call the jury's attention to this book; it is an ordinary day-book starting out on April 15:

"Mr. Blackmore engaged as engineer, Mr. Daniell engaged as second engineer, and certain pay-

ments made to those individuals, Gerbaudo, Patrick Walsh and other members of the crew mentioned." The next page, May 15, shows a list of the captain, the engineer and second engineer, and certain members of the crew. On the next page, May 15, it shows morning at San Pedro, and the captain and the chief and second engineer and mate and certain members of the crew there; it runs on the 16th, on the 17th, on the 18th, on the 19th, on the 20th, 21st; on the 21st is a note that Mossino changed from sailor to fireman, and another man from fireman to sailor. Received from Mr. Campanelli $1000. Campanelli left for San Francisco, and certain payments made to the crew. On the 22d are still shown certain payments that were made to the crew, clear on down to the 23d. On the 23d again it shows a man engaged as sailor at $98. Received from McMillen $2200; paid Spreckels for coal $1700, and it runs on, and there are certain days, the 27th down to June 3d it just gives the date without any reference to what they were doing. Here on June 11th are certain payments to the crew, on the 12th and 13th, 14th, until we get down to the 20th day of June, which is the last item shown, Havana Harbor 7:30 A. M.

Mr. TULLY.—I wish to assign as prejudicial error the [83] reading from that book of a reference to any other defendant than Captain O'Hagan.

The COURT.—You can make the objection.

(Testimony of H. S. Creighton.)

Mr. TULLY—I ask that the jury be instructed to disregard any reference by counsel.

The COURT.—I have told the jury time and again that the entries at this time are not to be taken against anybody except the captain.

Mr. TULLY.—Exception.

WITNESS.—(Continuing) I had a conversation with the defendant De Maria on September 15, 1924. The interview took place in my office in the presence of Mr. Enlow. . . . .

Mr. TULLY.—We make the formal objection that it is immaterial, irrelevant and incompetent, and hearsay, so far as any of the other defendants are concerned.

The COURT.—Yes.

I made a written memorandum of De Maria's statement. A Mr. De Maria was in my office September 15, 1924. He was questioned as to his age and his residence. I cannot give you his age or residence exactly. I believe he said his age was 50. He made reference to the fact that he had previously owned a certain saloon in Mexico, at Tia Juana; that he had operated this in some manner with a man by the name of Gandi, but that the original saloon or the business had been dissolved, I believe due to the fact that there was a fire destroyed the business; and that later Gandi formed some alliance with another saloon man in Tijuana and continued to operate the saloon, which I believe is the Red Mill; that he, himself, De Maria, had owned what is known in San Francisco as

(Testimony of H. S. Creighton.)

Caesar's Grill or Restaurant, that he had sold it, and he stated the names of the [84] parties to whom he had sold it; and I believe he disclaimed that Caesar's Grill had ever been searched, or any seizures of liquor made while he was operating it, but that after he had sold it it had been searched, liquor found there, and arrests made there several times; that there was a man, whose name I can't recall, that he had known him for some time, who owns the wholesale liquor house at Ensenada; that he, himself, De Maria, made a practice of running down to Tijuana and Ensenada, or to Tijuana at irregular intervals, largely for his own personal entertainment; that he had known this wholesale or warehouseman for some time—I can get the man's name.

A. Cardinelli—that he had known Cardinelli for some time; that Cardinelli had solicited him to join with him in the wholesale liquor business, the ownership of this warehouse, and that he had gone with Cardinelli or at his solicitation, I am not quite certain; that Cardinelli owned a bonded liquor warehouse in Ensenada and was building a brewery and distillery at Tijuana; Cardinelli had been trying to interest him, De Maria, to invest some money in this enterprise, and De Maria said that he might take a share in it, but up to the present time had not done so; that he went to Tijuana the last time about three weeks ago, went down to Ensenada to see Cardinelli, and while there he was advised that there was an Italian ship in the harbor that was in distress. . . . .

(Testimony of H. S. Creighton.)

Mr. GILLIS.—He can look at it and read from the statement if he desires, before he goes on with the conversation, at any stage.

A. That he went down to Ensenada with this man Cardinelli, and while in Ensenada he had learned that there was an Italian ship in port in distress; that some man who had been employed by him I believe previously at the time he was in business in Mexico, and was not a policeman, I think—that the Mexican authorities had [85] taken—that he had learned the Italian ship was in the harbor and in distress, and that she had a large cargo of liquor on board, probably 8,000 or 9,000 cases, and he hired a local boatman, not this policeman, but a local boatman and alone was taken out to this ship and saw that it was not an Italian flag, and did not go aboard. Later, after he was ashore, he met the captain and some officer from the ship in one of the saloons, and they had a few drinks together, and this captain said that his liquor cargo was destined for McMillen at Vancouver; that the ship, the "Giulia," was about 50 years old, and a regular coal hound, and that he had found it necessary to burn some of the rails and superstructure in order to get in to Ensenada; that he came there in distress for both water and coal, and that he was now waiting for coal to be sent by Beermaker, a broker at San Diego, that he had ordered this coal but was in doubt about it coming, and asked De Maria that when he arrived in San Diego he should request Beermaker

(Testimony of H. S. Creighton.)

to send it. Beermaker owns the ship "Gryme" and runs it in the supply business from San Diego to Ensenada, Mexico. Apparently, it makes a daily trip, but there was some doubt about getting this coal down, and the captain of the "Giulia" was anxious. De Maria said that he remained in Ensenada only about four hours and came back to Tijuana, and traveled by bus to San Diego, at which point he telephoned to Beermaker about this captain's request, and was advised that all arrangements had been made. De Maria claimed that he had no interest in the ship or the cargo, or the supplying of it with coal, other than above, and did not pay for the coal or guarantee the account in any manner. He said that he proceeded from Tijuana to Los Angeles by bus and by private automobile from that point to San Francisco. It was at this point in the interview that he made reference to the Mexican policeman that had previously been employed by him in Tijuana while he was in business at that point, [86] and that it was from this policeman that he received the information that the "Giulia" was an Italian ship and in port. He did not recall the name of the policeman. The Mexican Government had inspected the cargo of the "Giulia" and as the same was not destined to be discharged in that port, it had placed two policemen on board as guards. De Maria's policeman friend may have been one of those so detailed; he was uncertain about that.

De Maria described the captain of the ship as

(Testimony of H. S. Creighton.)

being a dark-complected Englishman about 50 years of age, not, however, so dark as his own complexion. He denied that he had made any presents of quantities of liquor to any Mexican officials, either direct or through this captain, while he was in Ensenada. He stated that the captain explained that his cargo consisted of Bicardi rum and Bourbon whiskey, a class of goods of which the liquor supply houses at Vancouver were short; that they had plenty of Scotch but none of this class of goods, this being De Maria's explanation as to why he felt certain that the cargo was to go on through to Vancouver. He stated that the ship came through the Panama Canal.

Mr. De Maria said further that a short time after seeing this ship in Ensenada, that he had read in the paper that there was a rum runner loaded with 35,000 cases off Los Angeles in distress, and that he believed the quantity of cargo is merely an exaggeration, and would imagine that this is the same ship "Giulia" saw in Ensenada, because it would have had about sufficient time to reach Los Angeles. The restaurant which he had previously on Columbus Avenue was Caesar's Grill, that he had sold this to Fornee and Dutch White, and after the place was sold he believed it was raided two or three times. He, himself, De Maria, had not been in British Columbia since 1895; he was on the boat "Tamalpais" about 5 A. M., September 12, 1924, when the rum runner power boat was burned at Sausalito; he saw it burning. His in-

(Testimony of H. S. Creighton.)

formation is that the boat was [87] tied near the dock; one man went aboard to start the engine, it back-fired and set fire to the boat. This engineer jumped overboard and swam to the nearest boat, which was anchored so near it had to move away from the fire. The boat that was burned is, or should be, well known in Sausalito as a rum-runner. During this time it had tied up there every two or three days. It was his opinion that it was used to go out to sea, take off 100 or 125 cases, land them down the coast, probably at Half Moon Bay, and then come back into the harbor without any liquor aboard; and await the next opportunity to repeat the operation. De Maria stated that he knows of no liquor operations being carried on in San Francisco at that time, that is, none that he cared to discuss, but he said he believed Joe Parenti and Eddie Marron had been hit very hard by their losses. . . . .

Mr. TULLY.—We make the same motion, to strike it out.

The COURT.—Yes . . . .

Mr. VINCILIONE.—I would ask, if your Honor please, that the evidence of Mr. Creighton be excluded at this time, for the reason that it nowhere shows that the conspiracy existed, and that the members of the crew were members of the conspiracy, no contact shown between them. I make this objection pro forma at this time.

The COURT.—Yes, it will be overruled. . . . .

(Testimony of H. S. Creighton.)

On cross-examination the witness testified as follows:

The defendant De Maria came to my office in response to a telephone call. I do not remember showing a picture of the boat "Guilia" to De Maria. I have a photograph which purports to be a photograph of the boat "Guilia." I have another picture in my pocket. I did not show this picture either. My best recollection is that De Maria stated the cargo on the "Giulia" belonged to a man named McMillan. He explained his entire [88] connection with it resulted from a request from the Captain to see that he got coal. . . . .

Q. And did you not testify in this court that a Mexican official formerly at Tijuana had told De Maria, according to De Maria's statement, that this boat belonged to a man named McMullen?

A. Is your question, did De Maria make that statement to me?

Q. Yes; that the Mexican official had told him that? A. A Mexican policeman.

Q. That is what you testified to this morning?

A. Yes.

Q. That it was not De Maria that told you that he knew that the boat belonged to McMullen, but it was merely that he, De Maria, had been told by the Mexican policeman? A. I don't know.

Q. Isn't that what you testified to this morning?

A. No, sir.

Q. Haven't you any recollection of your testimony this morning?

(Testimony of H. S. Creighton.)

A. No, sir, not to that extent.

Q. You have no independent recollection of your testimony this morning?

A. No, sir, not to that extent. I testified this morning from the memorandum. . . . .

De Maria stated to me that Beermaker, the custom broker at San Diego, had taken up with the authorities at San Diego the mater of coaling the "Giulia" in Mexican waters.

TESTIMONY OF WILLIAM A. NEWCOM, CALLED AS A WITNESS FOR THE UNITED STATES.

WILLIAM A. NEWCOM, a witness called on behalf of the United States, being first duly sworn, testified as follows:

I am a passport agent of the Department of State and I have translated the Italian letter marked Government's Exhibit 5.

Mr. CONNOLLY.—I object to its introduction on the following grounds: The testimony yesterday of Mr. Creighton was that this letter which is now being introduced in evidence was taken from the person of Captain O'Hagan. The Government at this time desires its introduction in evidence. [89]

Mr. GILLIS.—No, I do not; I am not asking for that, at all. The letter has been already introduced in evidence. . . . .

Mr. GILLIS.—That is very true. I offer the letter and the translation in evidence.

Mr. CONNOLLY.—To which I will object on behalf of Captain O'Hagan on the following grounds: The testimony of Mr. Creighton was that this letter was taken from the possession or the person of Captain O'Hagan. Now, under the decision of the Supreme Court of the United States in Boyd vs. United States, this clearly would be inadmissible as a violation of the defendant's rights under the Fifth Amendment of the Constitution.

Mr. GILLIS.—I want to make myself clear. Whose rights do you claim have been violated?

Mr. CONNOLLY.—I am claiming that the rights of the defendant O'Hagan will be violated if this letter is introduced. Now, in the Boyd Case, the headnote No. 6 says, "The seizure or compulsory production of a man's private papers to be used in evidence against him is equivalent to compelling him to be a witness against himself, and in a prosecution for crime, penalty or forfeiture, is equally within the prohibition of the Fifth Amendment."

It is immaterial whether the seizure was legal or illegal; it does not fall within the Fourth Amendment, which would relate to illegal seizures, but it comes clearly within the Fifth Amendment, that no man can be made a witness against himself. And this letter is similar in all respects to the document sought to be introduced in evidence.

The COURT.—In the Boyd case, the document was seized without a warrant. . . . .

The COURT.—I am familiar with the Boyd Case; I do not think this case comes within the ruling of the Boyd Case. This is [90] evidence taken from a man, surrendered by him and found on his person.

. . . .

Mr. TULLY.—At this time I desire to object to the introduction of the translation, and also as to the alleged letter, upon the ground that it is immaterial, irrelevant and incompetent, no foundation has been laid, that it is hearsay of the purest sort; that the document which they purport to introduce here appears to be a copy of a letter which is unsigned, and, so far as we can ascertain*ed* from the record, was never mailed, was never in the possession of the party to whom it was addressed, and was not taken from his possession. There is nothing to show that this document had ever come to the notice of any defendant in this case.

The COURT.—Except the captain.

Mr. TULLY—Except the captain, and the only matter that apparently came to his knowledge, so far as this record shows, was that the instrument came from his person. Now, as to the letter, itself, and the contents of the letter, it appears to have in no way come to the notice of any of the defendants, particularly the man to whom it was addresssed.

The COURT.—It was taken from the captain and I think it is competent as against him. I don't know about the others. That will depend on circumstances.

Mr. KELLY.—Exception. . . . .

The following is a translation of the letter addressed to G. Campanelli: [91]

"Mazatlan, Mexico, August 11, 1924.

"Mr. G. Campanelli,
17 Columbus Avenue,
San Francisco, Cal.

"Sir:

"Today towards evening we are ready to leave and I believe that it would be well to send you this letter in order to explain to you better than by means of a telegram the things that have happened since we have arrived in Mazatlan.

"We arrived here Monday morning at 3:00 o'clock and were anchored as best we could in the Bay of Mazatlan because here there is no port or rather there is no wharf. Later on in the morning when the customs officials came on board and inspected the documents, the Captain only was permitted to go ashore in order to despatch the business connected with the boat. In view of the fact that I was not able to go on shore with him, I requested him to send the telegram asking the sum of $3,000, which at that moment I considered sufficient to pay the expense of the coal which here costs $29.00 a ton in addition to other loading charges, which loading is done entirely by men who belong to the union and who load only the amount of coal which the union designates, and in any event they will not work for less than 3 Mexican pesos an hour.

"In the meantime the day passed and after dinner I obtained permission to go ashore with the Captain, and the first thing I did was to send a telegram

confirming the one sent by Hagen precisely, because having understood that he had sent the telegram in his own name, you naturally would not send the money. That being done and believing that you would thus understand, I then went to see the agent and the Consul to make necessary arrangements, and then returned on board.

"In the meantime the railroad company, which is the only concern here that has coal, informed us that they would not begin the work of loading the coal on the launch until the money had been paid to their representative here. The carbon must be taken from the warehouse belonging to them which is located [92] about 9 miles from where our boat is anchored, which place, like all of the Bay of Mazatlan, is a very bad place at night-time, so much so that all of the ships which arrive here during the night remain in the open sea until daybreak, because of the dangers of the port itself.

"We waited the entire day of the 6th without any news, which we anxiously awaited in order to enable us to leave as soon as possible.

"On the 7th a fire broke out in the ship's coal bunkers, a fire which was caused by spontaneous combustion on account of some water having entered into the bunkers during the terrible storms which we have here so often. They did the best they could to take about 35 tons of coal from the bunkers, but the gas which, was developed from the fire became so strong and unbearable that the men could not breathe and they were obliged to have re-

course to the pumps to throw water on the bunkers and use their pumps to pump it out again. But the fire, notwithstanding all this water, did not diminish. On the contrary, removing the coal allowed the air to penetrate better and consequently the coal burned stronger than before and continued to produce even more gas.

"It was finally decided to call the Captain of the Port and Lloyd's Agent, and also an agent, for their advice. They immediately came on board and advised us to call for help from shore and to do everything needful as soon as possible, otherwise the boilers might blow up and the ship entirely destroyed. We took their advice and sent for all the men we could get from the shore, who set to work with the members of our crew and worked with all possible speed and energy during the entire night to save the ship. We then took a few hours of rest and on the morning of the 8th the men were called on board from shore as well as the members of our own crew and recommended their work and continued working with much energy until 5:00 o'clock in the evening, at which hour the men who came on board from the shore returned to the city and our own crew continued to work by themselves.

"On the morning of the 9th the flames began to subside, and by throwing water on the coal towards noon on the 9th the fire was completely under control and the ship's bunkers then contained very little coal indeed, which [93] was pulled up to the deck in sacks, which sacks we were obliged to

buy, and the carbon was heaped together on the deck with the rest of it.

"The result of the fire was that the bottom of the ship's bunkers, being made of wood, was two-fifths burned away. A lead pipe for carrying water was also burned together with other minor inconveniences, all of which was repaired by the crew, and when the marine insurance agent came on board a second time to inspect the ship, and the damages caused, and the work done, he expressed himself as highly satisfied with everything.

"In the meantime I had received your telegram asking $4000 instead of $3000 on account of the accident which had befallen the ship above described. Afterwards I received notice from the bank that they had an order to pay me $3500. I at once went ashore with the Captain and the English Consul, received the money, opened two accounts with the same bank, one in Mexican pesos and one in dollars; I had with me enough money to pay for the carbon; also went to finish buying other articles and afterwards went to see the coal bunkers and promised a small tip to the superintendent if he would handle the job of loading the coal promptly and well.

"On the 10th I received another telegram saying that you had sent me 7 telegrams and asking a reply to each of the 7. I am satisfied I answered every telegram that I received, because as you can easily understand, as I myself understood, that because of an unfortunate combination our various telegrams

had crossed each other on their way and for that reason I thought it was a waste of time and money to do any more telegraphing.

"I have dated this letter in advance, dating it tomorrow, because I will not be able to post this letter. However, I expect to write you again when we get to sea on the evening of the 10th, but in this moment every thing is going along nicely on board.

"I am endeavoring in every possible way to work for your interest in everything, and when we arrive I want you to ask anybody on board if in their [94] opinion whatever I have done on board has not been done in perfect good faith, and if I have not done everything on board possible to protect your interests. The insurance agent has assured me that all the expense in connection with fighting the fire will be repaid to us by the insurance company. The work of loading the coal will commence tomorrow, Monday the 11th of August at 7 in the morning, and I firmly believe that by midnight on that day all will be loaded and everything all right. The provisions will also arrive during the morning, so I am not in a position to tell you precisely the hour of our departure. We have calculated that in order to arrive at the point designated it will take us eight days, but in case we are favored with good weather or favorable winds we will be able to make the trip in 7½ days, so that leaving Mazatlan Monday night we ought to be at the post designated on the 18th of this month, after dinner, always understanding that no unfortunate accident occurs.

"I beg of you when you come on board, or send on board, to send us the precise hour, or in nautical terms that which they call Greenwich mean time. I make this request because the Captain says the chronometer we have on board is not much good. The Captain also asks that you buy for him a sextant made by Heath, possibly a second hand one, because the one he has has been injured by the water and is not in good condition.

"After we pay all the expenses, if there is money enough left, I think it will pay us to make another return voyage.

"When you come on board do not forget to bring the mail, and if there is not any, if you want to do me a grand favor, send to the postoffice on 7th street and ask if there is any mail for me and if so, bring it along with you.

"I will not tell you now everything that happened to us during the voyage, especially in Cuba and Panama, but I will tell you all about it and other very interesting things when we see each other. I think it is better that I not say any more but I will tell you all about it when I see you.

"I have already advised you that from the shipload some cases have disappeared for several reasons.

"With cordial regards to everybody." [95]

TESTIMONY OF FRANK H. RIVERS, CALLED AS A WITNESS FOR THE UNITED STATES.

FRANK H. RIVERS, a witness called on behalf of the United States, being duly sworn, testified as follows:

I am an immigration inspector and was present on the Steamship "Brookings" when the "Giulia's" crew was brought in the Bay. At that time the crew was polled and the names were called off by Captain O'Hagan, one of the defendants here. The crew consisted of the following persons: Ramiro Basterrechea Regueiro, Jesse Leroy Daniell, Augustus Rodney, Robert Castagno, Crestino Massino, Giuseppe Mancardi, Jose Abellon, Manuel Sanches Novo, Juan Bermudez, Antonio Diar Rilo, Manuel Consuelo Gonzales, and William Blackmore, and John O'Hagan. The crew were at that time in the custody of the immigration authorities. I heard afterwards they were turned over to the United States Marshal.

Cross-examination.

From the time I took charge of the Captain and members of the crew they were in the custody of the Immigration Department.

TESTIMONY OF LAWRENCE A. HANSON, CALLED AS A WITNESS FOR THE UNITED STATES.

LAWRENCE A. HANSON, a witness called on behalf of the United States, being duly sworn, testified as follows:

(Testimony of Lawrence A. Hanson.)

I am the Purchasing Agent for the Los Angeles Shipbuilding and Drydock Corporation, and have been connected with that company for four years. I saw the defendant Campanelli in April or May of 1924. He was with Mr. McMillan. At that time I had a conversation with Mr. McMillan and Mr. Campanelli was with him. Mr. McFee and Mr. Hiefield and Mr. Caverly and myself owned the "Frontiersman." Mr. McMillan was the purchaser of the vessel and Mr. Campanelli entered into negotiations later on. [96] Two final payments were made on the boat by Mr. Campanelli. The first payment of $300.00 was made by Mr. McMillan. [97] March 12, 1924. The second payment of $500.00 was made by Western Union money order on March 13th. The third payment was with a *$4,500.00.00* check drawn on a San Francisco bank on March 21st, signed G. Campanelli. The fourth payment was by $5,000.00 upon a San Francisco bank, signed G. Campanelli. The captain who took possession of the vessel later was Captain O'Hagan, one of the defendants in this case.

Cross-examination.

Mr. McMillan negotiated the purchase of the boat from me and my associates, and a contract of purchase was entered into by McMillan and the first payment made by him in cash. Mr. Campanelli did not deliver me the money order on the second payment. I do not know that he mailed it. He was present in the room when the $4,500.00 check signed G. Campanelli was made out and also

(Testimony of Lawrence A. Hanson.)

the $5,000.00 check. I cannot state whether Mr. Campanelli delivered the check to me or to one of my associates, but he was present when the checks were signed. We assigned our interest in the boat to Mr. McMillan and Mr. Campanelli. We did not execute the bill of sale inasmuch as the title was never transferred. The bill of sale was made in the name of the Los Angeles Shipbuilding and Drydock Corporation. When we received the $4,-500.00 payment we acknowledged receipt of the payment from G. T. McMillan, 1126 Bush Street, San Francisco. The option to purchase the vessel was given to Mr. McMillan. We assigned our interest in the vessel to Mr. G. Campanelli and Mr. McMillan; it was a joint assignment. The execution of the bill of sale was made in the name of the Los Angeles Shipbuilding and Drydock Corporation to Mr. McMillan and Mr. Campanelli.

I and my associates conversed with other prospective purchasers. One of the other prospective purchasers was a Canadian. Negotiation for the purchase of the vessel began March 12, 1924, and the deal was consumated April 17, 1924. None of the other defendants here participated in the purchase of the vessel. I did not see the defendant [98] De Maria before the beginning of the trial of this case. [99]

TESTIMONY OF IGNACIO ALIOTO, CALLED AS A WITNESS FOR THE UNITED STATES.

IGNACIO ALIOTO, a witness called on behalf of the United States, being duly sworn, testified as follows:

I am a fish dealer. I know the defendant Campanelli. I saw him on or about September 13th or 14th in 1924, and had a conversation with him. On or about the 8th or 10th of September Mr. Campanelli hired my boat called the "Nat" to bring provisions to a big boat outside. Nothing was said then about bringing in any liquor. A few days afterwards I found he had used the boat to bring in some liquor and I told him to use it for liquor. I never went out on the boat. I received $2,500.00 on account of bringing in the liquor. I was supposed to receive $3.00 a case. Mr. Campanelli never mentioned the name of the boat that was outside. I received the money *for* Mr. Campanelli at 17 Columbus Avenue in this city. He still owes me a little over $2,000.00.

Cross-examination.

I have not been indicted in this case and no charge has been placed against me. I did not deliver my boat to Mr. Campanelli. The captain of my boat took it out. I did not see Mr. Campanelli take the boat, nor did I see Mr. Campanelli. load any liquor upon the boat, nor did I see any liquor on the boat whatever. I do not know where

(Testimony of Ignacio Alioto.)

the boat was taken. I do not know whether it went outside the Bay. My boat was seized by the United States Government. I now have the boat. It was released to me on bond. No one interviewed me with reference to my testimony.

Q. Did you discuss your testimony with any agents of the Government? A. No.

Q. Did you interview any of the agents of the Government? A. No.

Q. Do you know Mr. Creighton?

A. Yes. [100]

Q. Did you ever discuss the case with him?

A. After I talked to Mr. Morris, Mr. Morris sent me to Mr. Creighton, and told me to tell the truth, what I know, and I did.

Q. Then you have discussed your case with a Government agent, namely, Mr. Creighton?

A. Yes.

Q. Was your boat under seizure at the time you first went to see Mr. Creighton? A. Yes.

Q. After you saw Mr. Creighton, and made a statement, you got your boat back, it was released on bond, was it not?

A. After about two or three weeks; yes.

Q. When you saw Mr. Creighton, Mr. Alioto, did he offer you any inducement to make your statement? A. No.

Q. You just came in there and said, "I want to make a statement to you?"

A. Mr. Morris told me to go to Mr. Creighton,

(Testimony of Ignacio Alioto.)

and tell him what I knew, and I went to Mr. Creighton and I told him what I knew.

Q. You told him that you had rented your boat for the purpose of transporting liquor, did you?

A. I told Mr. Creighton first that Mr. Campanelli came to me and he wanted the boat to bring the provisions on board, and finally to bring some coal, and then the liquor.

Q. You told him that you were giving the boat for the purpose of transportation of liquor?

A. Yes.

Q. Did he offer you any immunity for your testimony? A. No.

Q. Did anybody? A. No.

Q. But you have not been indicted in this matter.

A. No.

Q. Do you expect to be?

A. I don't know. The $2,500.00 in money I received I gave to the two men on the boat. I know a man named Mac—not McMillan. I do not know whether any [101] liquor was actually transported. There were two men on my boat. The captain of my boat has not been arrested as far as I know, but I took the captain along with me at the time I saw Mr. Creighton, and also the deckhand. Neither the Captain nor the deckhand of my boat have been sent to Angel Island. I did not have any conversation with any of the other defendants about bringing in liquor. I know Mr. De Maria for ten or fifteen years. Mr. De Maria did not ask me to take any provisions out in my boat to the "Giulia," or

(Testimony of Ignacio Alioto.)

any other place, nor did he ask me to land any liquor fro mthe "Giulia" or any other boat. The Captain of my boat is still in my employ and is still operating the boat.

Redirect Examination.

I paid the two men on my boat $1,600.00 of the $2,500.00 that I received, and I kept the balance myself.

TESTIMONY OF PABLO HERMAN, CALLED AS A WITNESS FOR THE UNITED STATES.

PABLO HERMAN, a witness called on behalf of the United States, being duly sworn, testified as follows:

I live on Filbert Avenue. In September 1924 I was the captain of the boat "Nat," and was working for Mr. Alioto, the witness who has just left the stand. I took some provisions out in the boat, consisting of potatoes, vegetables, and bread. I went about two hours outside the Farallone Islands to the boat called "Giulia." I saw Captain O'Hagan of the "Giulia." He is here in the courtroom. I also took 150 sacks of coal out to the "Giulia," at approximately the same time and the same place. I brought liquor in three times, between 400 and 500 cases each load. I had my deckhand with me. Mr. Campanelli went out with us on the first trip when we took the provisions. My deckhand and some of the crew of the "Giulia"

(Testimony of Pablo Herman.)

unloaded the provisions. I personally did not have the orders for bringing in the liquor. My deckhand, Salvatore [102] Alioto, had the orders. I do not know to whom he delivered the orders. The crew of the "Giulia" assisted in loading the liquor.

Cross-examination.

On the trip that Mr. Campanelli accompanied us we came back with an empty boat. No liquor whatever was brought in on that trip. I have not been indicted or charged with any violation of the law for taking the coal out. I did not take any the liquor in and landed it in South San Francisco. My employer, Ignacio Alioto, did not pay me any money. He did not give me $1,600.00 or any such sum. My deckhand may have got it, I never did. I never received any and borrowed $100.00 from Alioto at one time. That is all the money I ever got.

TESTIMONY OF M. G. STURDEVANT, CALLED AS A WITNESS FOR THE UNITED STATES.

M. G. STURDEVANT, called on behalf of the United States, being duly sworn, testified as follows:

In September, 1924, I was master of a motorboat called the "Shark" in San Francisco Bay. On or about the 15th day of September 1924 I took 75 tons of coal out to the boat "Giulia" in the motorboat "Shark." When I first saw the "Giulia" it

(Testimony of M. G. Sturdevant.)

was near the Cordell Banks. I think the man here called Captain O'Hagan was the man I saw on the "Giulia." I did not deliver the coal to the "Giulia" at that place because it was too rough. We told them to come in behind the lee of Pt. Reyes. The bay is called Drakes Bay. I would say we delivered the coal to the "Giulia" at approximately a mile from the shore, but the Point runs down and we possibly might have been 500 or 600 yards from Pt. Reyes. We got coal from over in Oakland I do not remember the company. We did not bring in any liquor. I saw a man by the name of Adolph, with reference to payment for the coal He went to the captain of our boat first [103] and the captain brought him up to me and said that this man wanted to take a load of coal to a boat in distress outside. Adolph and a man I think they called Mac then made the arrangements for the coal. I received full payment with the exception of $78.00. I am not sure whether I received the money from Adoph or Mac. The payments were made in an automobile on Columbus Avenue. I went up to 15 or 17 Columbus Avenue with reference to the payment.

Cross-examination.

The only thing I took out was coal. I have not been indicted or charged with any violation of the law for taking the coal out. I did not take any provisions out and took no liquor back. I do not know the defendant DeMaria.

TESTIMONY OF F. J. THOMPSON, CALLED AS A WITNESS FOR THE UNITED STATES.

F. J. THOMPSON, a witness called on behalf of the United States, being duly sworn, testified as follows:

I am the manager of Spreckels Bros., San Diego, and occupied that position in September 1924. On September 2, 1924, I met the defendant DeMaria and had a conversation with him relative to some coal. Mr. Beermaker was present. Mr. Beermaker called me up and I went over to his office and met Mr. DeMaria. Mr. Beermaker introduced me to Mr. DeMaria and said, "Now this is the gentleman. He says he has a boat in distress down in Mexican waters. He says that he calls her the 'Giulia,' but he says you never recognize it by the way they spell it." Mr. DeMaria wanted 75 tons of coal and I wanted the money before the coal went on the boat, because it was to be delivered in Mexican waters. He said he wanted it in 100 lb. sacks so he could handle it on and off the boat. I procured 35 tons of coal, which was all the coal I could get, and delivered it to Mr. Beermaker. [104]

Cross-examination.

I do not believe Mr. Beermaker left the office to go to the Custom-house while I was there. I supplied 35 tons of coal at $15.50 a ton and received $542.50. The money was turned over to me by Mr. Beermaker. Mr. Beermaker owned the boat that took the coal to Ensenada and he was in charge of

(Testimony of F. J. Thompson.)

the transportation. I did not know that there was liquor on the boat. As I remember it Mr. DeMaria gave his full name and did not try to conceal his identity.

TESTIMONY OF SALVATORE ALIOTO, CALLED AS A WITNESS FOR THE UNITED STATES.

SALVATORE ALIOTO, a witness called on behalf of the United States, being duly sworn, testified as follows:

I am a fisherman. In September 1924 I was working for Ignacio Alioto on his boat called the "Nat." I went with Captain Herman of the "Nat" alongside the "Giulia". The "Giulia" was west of the Noonday Rock, near the Farallones. I know defendant Campanelli. The first time I met him was here in San Francisco aboard the ship"Giulia."

Q. Did he go out with you or come back with you on the "Gnat?"

A. No, he went out, but he didn't come back with us.

Q. Did you leave him on the "Giulia?"

A. Yes, sir.

Q. What did you bring back from the "Giulia?"

A. Whiskey.

Q. On how many trips did you bring whiskey in from the "Giulia?" A. Three trips.

Q. Did Mr. Ignacio Alioto pay you for bringing this liquor in? A. Yes, sir.

Q. How much?

(Testimony of Salvatore Alioto.)

A. $1500; I want to make an explanation in regard to that money. [105]

A. (Continuing.) I am explaining that he gave me the $1500, and at the end of my work if there was any money coming to me he was to pay it to me, and if I owed them I would pay them.

The COURT.—Q. Who gave him the $1500?

A. Ignacio Alioto.

Q. He is the man who testified yesterday?

A. Yes.

Q. He is the man who owned the boat?

A. Yes.

Cross-examination.

I am not related to Ignacio Alioto. I was working on the deck of his boat. The captain was Pablo Herman.

Q. And on the first trip out to the boat Mr. Campanelli went with you; is that the fact?

A. Yes, sir.

Q. What did you take out to the boat on that particular occasion?

A. The first time we brought coal.

Q. You brought coal? A. Yes, sir.

Q. Are you sure it was not provisions?

A. I believe it was the second time that we brought the groceries.

Q. Are you sure that you did not bring groceries out on the first trip? A. I can swear to it.

Q. Then you are not sure that you brought coal out the first trip?

(Testimony of Salvatore Alioto.)

Mr. GILLIS.—I think he just answered that, may it please the Court.

Mr. TULLY.—This is cross-examination, your Honor.

The COURT.—Let him answer.

A. I am sure that we brought coal.

Q. You are just as sure of that as you are of any other portion of your testimony?

A. Yes, sir.

Q. On your first trip out to the boat, did you bring [106] any liquor back? A. Yes, sir.

Q. You did? A. Yes, sir.

Q. Was Captain Herman on the boat at that time? A. Yes, sir.

Q. Is it not a fact that on the first trip out there you came back with an empty boat?

A. I can say that we took the trip.

Q. Can you say definitely whether you brought liquor back on the first trip, or whether you came back with an empty boat?

A. I can't swear to a lie. I am telling you what I remember.

Q. Then you don't remember with reference to the first trip, as to whether you brought any liquor in, or not?

A. I can only tell you what I remember. I can't tell you what I can't remember and I don't want to tell a lie.

Q. Well, think it over, then.

A. I believe that we went aboard the "Giulia"

(Testimony of Salvatore Alioto.)

and that we came back to get the coal, and then went right back with the coal.

Q. Let me ask you this question: If the captain of that vessel stated that you went out with provisions the first trip, and came back with an empty boat, the captain is mistaken, then, is he?

A. I can only answer that in this way, that if the captain testifies one way and I testify the other way, of the two of us one must be mistaken.

Q. On this first trip out, on which Mr. Campanelli went with you, did you bring him back in the boat with you? A. Yes, sir.

Q. He came back in the boat with you? [107]

A. Like I have told you, Campanelli went out aboard the boat with us, and they were short of coal, and we turned right around and came back to get the coal, and he came back with us, and when we returned with the coal he stayed on land.

Q. However, you recall, though, that Mr. Campanelli went out with you on the first trip?

A. Yes.

Q. Do you recall him going out on any other trips? A. No.

Q. Then how did you leave him on board the ship? A. Who?

Q. Campanelli?

A. I can tell you again, that when we went out alongside of the "Giulia" Campanelli was aboard the boat with us, and when we got out there they told us they were short of coal, and we turned around and came back to the city. He was aboard

(Testimony of Salvatore Alioto.)

with us. We got our coal and started back, and when we returned to the "Giulia" he was not aboard the boat.

Q. In other words, then, you did not leave him on the "Giulia," as you testified on your direct examination?

A. I am telling you again that I am telling you exactly what I know and what I recall.

Mr. TULLY.—Q. In other words, you did not leave Mr. Campanelli upon the "Giulia"?

A. No.

Q. When you went out to the "Giulia" on this first trip and you turned around and came back, did you have any liquor on board when you turned around and came back? A. No, sir.

Q. There was no liquor on board, then?

A. No, sir.

Q. Have you been arrested in this case?

A. No, sir.

Q. No charge has been placed against you?

A. No, sir. [108]

Q. This $1500, that money was paid to you by Mr. Alioto, your employer, was it not?

A. Yes. That was not the complete payment; I told Mr. Alioto that I needed a little more money than was coming to me and if he could give that money to me that when Campanelli finished paying Alioto then he and I could square up.

Mr. TULLY.—Q. Are you sure that the sum was not $1600?

A. No, I can say it was $1500.

(Testimony of Salvatore Alioto.)

Q. The sum was $1500? A. Yes.

Q. Did you pay any of that money to the captain of the vessel? A. No, sir.

Q. You kept all of the money, yourself?

A. Yes, sir.

Q. You didn't pay any portion of it to anybody else? A. No, sir.

Q. Did Mr. Alioto tell you to go and bring that liquor in? A. Yes, sir.

Q. You received your orders, did you, from Mr. Alioto? A. Yes, sir. [109]

TESTIMONY OF FRANK LANDL, CALLED ON BEHALF OF THE UNITED STATES.

FRANK LANDL, a witness called on behalf of the United States being duly sworn, testified as follows:

I do not know who I was working for in September of 1924. I couldn't say. I cannot say that I was working under any definite person. I know a man by the name of Lenhart. I do not know whether I was working for him, or not. Mr. Lenhart paid me. I was working on a small boat No. 3569. I went out to the "Giulia."

Mr. TULLY.—For the purpose of the record, your Honor, may we have our formal objection to this, that it is immaterial, irrelevant and incompetent, and the proper foundation has not been laid?

The COURT.—All right. . . . .

The "Giulia" was out near Noonday Rock, about

(Testimony of Frank Landl.)

an hour and a half trip. I recognize captain O'Hagan here in Court as being the captain of the boat. I brought back a load of liquor from the "Giulia,"—approximately four loads, with about 300 cases to the load. On one occasion I saw the defendant, Campanelli on the "Giulia." I saw the defendant, De Maria on Montgomery street. Part of the liquor was landed at Lamatong Bay, and the rest above Point Bonita. I was not out on the C 808. I was paid $50. a trip. I saw Henderson and he made a trip with us out to the "Giulia."

TESTIMONY OF GEORGE W. BEERMAKER, CALLED ON BEHALF OF THE UNITED STATES.

GEORGE W. BEERMAKER, a witness called on behalf of the United States being duly sworn, testified as follows:

I am a customs broker at San Diego, In September, 1924 I saw the defendant, De Maria, and he asked me to procure him [110] some coal which I did through Mr. Thompson of the Spreckels Bros. Commercial Co. I procured 35 tons of coal for him and they were delivered by Captain Richardson, on board my boat "Gryme." DeMaria deposited with me two $500 bills. The total amount of the bill was $815, and I gave him a check for the balance.

(Here the Government offered in evidence the check and it was marked U. S. Exhibit 8.)

(Testimony of George W. Beermaker.)

Cross-examination.

At the time Mr. De Maria asked me for the coal I know I went across to speak to the authorities at the Customs-house, and asked them if it would be lawful for me to take the coal to Ensenada, Mr. De Maria did not say that he did not want a check. He dealt with me like any other customer. He did not say he wanted the transaction to be a secret transaction.

TESTIMONY OF JOHN RICHARDSON, CALLED ON BEHALF OF THE UNITED STATES.

JOHN RICHARDSON, a witness called on behalf of the United States being duly sworn, testified as follows:

In September, 1924 I was working for Mr. Beermaker. I was the captain of the "Gryme." At that time I delivered coal to the "Giulia" in Ensenada; approximately 35 tons. I took the coal from San Diego under Mr. Beermaker's instructions. One or two days prior to delivering the coal I had a conversation with Mr. De Maria in Ensenada, in Tom Quinlan's saloon. Tom Quinlan introduced me to Mr. De Maria and said, "He is an old friend of mine from 'Frisco,' he is a good square fellow, give him anything he wants." Quinlan did all the talking. We had a drink or two, and Mr. De Maria did not say much of anything about the "Giulia." [111]

(Testimony of John Richardson.)

Cross-examination.

We were drinking at the bar with Mr. De Maria. De Maria did not say he had any interest in the boat.

TESTIMONY OF B. W. GRABLE, CALLED ON BEHALF OF THE UNITED STATES.

B. W. GRABLE, a witness called on behalf of the United States being duly sworn, testified as follows:

Mr. GILLIS.—Q. Your position is what, Mr. Grable? A. Secretary of the King Coal Co.

Q. *Where* you secretary of the King Coal Co. in December, 1923? A. I was.

Q. I show you an instrument and ask you if you recognize that, Mr. Grable? A. Yes.

Q. What is that, Mr. Grable?

A. It is a receipt that we give, or rather, take from people who take coal from our bunkers at our Oakland plant.

Q. That is a receipt that was given for coal delivered to what steamer?

A. The steamer "Mae Heyman."

Q. The date is December 5, 1923? A. Yes.

Q. Do you know of your own knowledge that coal was delivered from your dock to the "Mae Heyman"? A. It was—

Mr. TULLY.—Just a minute. At this time we will object on the ground it is immaterial, irrelevant and imcompetent. I cannot see what the purpose of this is at all. . . . .

Mr. TULLY.—It does not tend to prove any of the allegations of the indictment. . . . .

The COURT.—It is offered against McMillian and Henderson, alone?

Mr. GILLIS.—No. The act of one co-conspirator is the act of all. [112]

The COURT.—You would have to show that these other people were partners in this conspiracy at that time. About when was this? This was in 1923, was it not?

Mr. GILLIS.—This was December 5, 1923.

The COURT.—We have not had any evidence up to this time connecting them with the transaction in December, 1923. . . . .

Mr. GILLIS.—This is a bill dated December 5, 1923, showing a delivery of coal to the "Mae Heyman." This is for the purpose of connecting these defendants with the "Mae Heyman." But the "Mae Heyman" was seized on April 10, 1924, after the "Frontiersman" had been sold to the other defendants.

The COURT.—I think it would be competent against McMillan and Henderson, but I do not see how it would be against the other parties.

Mr. TULLY.—The situation is this, they are charging a specific conspiracy here in this indictment, and they are limited to proving that conspiracy.

The COURT.—From and after January, 1924.

Mr. TULLY.—Absolutely, and they cannot introduce as an overt act anything that precedes the

conspiracy which they lay here; in other words, you cannot have an overt act preceding the conspiracy, it must follow.

The COURT.—This is not one of the overt acts alleged in the indictment?

Mr. GILLIS.—No; the date of the conspiracy in the indictment is January, but we are not bound specifically by that date. We show that a conspiracy begins in the fall of 1923. Now, as a part of that conspiracy there was owned by these two conspirators, that we are able to show, the "Mae Heyman," and we show the ownership of that boat, and the control of that boat through these coal [113] bills at that time, and then we come on down into March of 1924, and at that time we have the sale of the "Frontiersman," which is the "Giulia"; that was in March. Now, in April, a month later, the "Mae Heyman" was seized. Now, at the time the "Mae Heyman" was seized, we could not present evidence as of April 10, at that time, as to the ownership of the "Mae Heyman," because Henderson and McMillan were not aboard the "Mae Heyman," and all that were arrested and seized on the "Mae Heyman" were the crew, and the men who actually and physically handled the liquor; but we do show the connection of the conspirators with the "Mae Heyman" and the liquor business, and it was seized after the "Frontiersman," the "Giulia," had been purchased by these conspirators.

Mr. TULLY.—May I direct your Honor's at-

(Testimony of B. W. Grable.)

tention to the indictment, itself? The indictment lays the conspiracy as having occurred in San Francisco Bay on the 1st day of February, 1924.

. . . .

The COURT.—I think it is competent as against McMillan and Henderson.

Mr. TULLY.—May we reserve an exception?

The COURT.—Whether the other people are bound by it would depend upon what the evidence shows was their connection with the conspiracy, if they were connected with it at all.

Mr. GILLIS.—I ask that it be introduced in evidence and marked Government's exhibit next in order.

(The document was marked U. S. Exhibit 9.)

Mr. WILLIAMS.—May the objection and exception taken by Mr. Tully apply to all defendants?

The COURT.—Yes.

Mr. GILLIS.—Q. Do you remember on December 5, of a payment to your company?

A. There was one made, yes.

Q. Do you remember approximately what that was? A. $390 odd.

Q. How was it paid?

A. It was brought into the office in currency by a young lady. [114]

Q. You don't remember the young lady?

A. No, I do not.

Q. Do you remember whether you made deliveries of coal to the "Mae Heyman" after this date? A. We did.

(Testimony of B. W. Grable.)

Q. How late a date?

A. Into January, the latter part of January.

Q. 1924? A. 1924.

Cross-examination.

I do not know, personally, whether this coal was delivered. I did not see it delivered. A young lady paid the bill for the coal. She brought the money to the office. I do not know Mr. McMillan nor do I know Mr. Henderson. I don't know any of the defendants here. They did not pay it.

Mr. TULLY.—We move to strike out all of this testimony as immaterial, irrelevant and incompetent, and based on hearsay.

The COURT.—A young lady who has been on the stand testified that she made the payment.

Mr. GILLIS.—Yes.

The COURT.—She was working for these other people, McMillan and Henderson.

Mr. TULLY.—May we have an exception?

The COURT.—Yes.

Mr. WILLIAMS.—As I understand the ruling of the Court it is that in view of the young lady's testimony this evidence is admissible against Henderson and McMillan?

The COURT.—As against Henderson and McMillan.

Mr. WILLIAMS.—The jury will understand it is not admissible at this time against any of the others? . . . . [115]

TESTIMONY OF JOHN L. BENSON, CALLED ON BEHALF OF THE UNITED STATES.

JOHN L. BENSON, a witness called on behalf of the United States being duly sworn, testified as follows:

I am the superintendent of the King Coal Co. I was such in December and January, 1923 and 1924.

Q. As foreman of the King Coal Co., did you supervise the delivery of any coal to the "Mae Heymen"? A. Yes.

Mr. TULLY.—We make the same objection.

The COURT.—All right.

Mr. TULLY.—And take an exception.

A. Yes.

Mr. GILLIS.—Q. Do you know of your own knowledge that the coal was actually in those two months delivered to the "Mae Heyman"?

A. Yes. . . . .

Cross-examination.

I delivered the coal to the vessel. The "Mae Heyman" was alongside our dock when I delivered the coal. It had no cargo on board. I do not know who paid for the coal. I do not know whether the "Mae Heyman" changed ownership in the meanwhile. [116]

TESTIMONY OF ALF OFTEDAL, CALLED FOR THE UNITED STATES.

ALF OFTEDAL, a witness called on behalf of the United States, being duly sworn, testified as follows:

Mr. GILLIS.—Q. Your position with the Government is what, Mr. Oftedal?

A. Special agent in charge, Bureau of Internal Revenue, Treasury Department.

Q. Did you see the defendant, Campanelli, on November 5, 1924? A. Yes.

Q. Did you have a conversation with him at that time? A. Yes.

Q. Did you take a statement from him at that time? A. Yes.

Q. Was that statement taken down in writing?

A. It was.

Q. Was it sworn to? A. It was.

Q. Were there any inducements or promises offered to Mr. Campanelli at that time?

A. None, whatever.

Q. Were there any threats or anything of that nature made against him? A. No.

Q. Have you that statement? A. Yes.

Mr. TULLY.—What was the date of that statement?

Mr. GILLIS.—November 5. A copy of that statement was given Mr. Campanelli at the time, was it not? A. Yes.

Mr. GILLIS.—Do you wish to look at it?

Mr. TULLY.—Yes.

Mr. WILLIAMS.—If your Honor please, this statement and other statements were furnished to us by Mr. Gillis the other day, to save time. There is a reference in this statement to Mr. De Maria, that is in the statement of November 5, after the arrest of Campanelli, and, under the ruling of the Court, it is not admissible against any of these alleged conspirators except Campanelli, himself; it is a long statement.

The COURT.—You mean Campanelli's statement?

Mr. WILLIAMS.—Yes. Would your Honor at this time, in fairness to the other defendants, reinstruct the jury on the question of law, so they will have it before them when this statement is read? [117]

The COURT.—I should think the jury understands that. I have tried to make that clear to them. After this conspiracy, if there was a conspiracy, terminated, then the declarations of one of the alleged conspirators as to what occurred previously in connection with somebody else to the transaction would not be evidence against the other party. You can readily understand that after a man is arrested for a crime, he might want to connect a most innocent man by making up some statement, and in order to protect that kind of a man, the law says that such a statement is evidence against the man who makes it, but not to connect the other people with it.

(Testimony of Alf Oftedal.)

Mr. GILLIS.—I will ask you now to read the statement, Mr. Oftedal.

Mr. TULLY.—At this time I object on the ground that it is immaterial, irrelevant and incompetent, the proper foundation has not been laid, in that it has not been shown that the statement was obtained freely and voluntarily.

The COURT.—Oh, yes, that has been shown.

Mr. GILLIS.—The witness testified that it was freely made and no promise made.

Mr. TULLY.—May we cross-examine at this time?

The COURT.—Certainly, you can if you want to.

Mr. TULLY.—I mean with reference to whether this was free and voluntary.

The COURT.—With reference to this particular statement?

Mr. TULLY.—Yes.

The COURT.—You may.

Mr. TULLY.—Q. Does this statement embody your entire conversation in regard to the matter discussed in here?

A. No; there was quite a bit of conversation aside from that.

Q. It does not embody everything?

A. Not everything that was said there, no.

The COURT.—I did not understand that you were to cross-examine as to the contents of the statement.

Mr. TULLY.—No; I wanted to find out whether it is the whole conversation, that is all. [118]

(Testimony of Alf Oftedal.)

The COURT.—You can find that out on cross-examination, if that is all you want to find out.

Mr. TULLY.—No, I want to find out whether he made any promise before, or whether this was the entire conversation.

The COURT.—Ask him about the promise; that is all we are concerned with now, and ascertain whether this was free and voluntary.

Mr. TULLY.—Q. What did you say to Mr. Campanelli with reference to making this statement?

A. I questioned him carefully as to all the facts connected with this "Giulia" case, different things that I considered material, and then—

Q. (Intg.) What was the first thing you said to him when he came in?

A. When he came in he was brought in by his friend, a man named Guido Braccini, who had previously made overtures to me with regard to the fixing of a bond; that is, at that time Campanelli was a fugitive from justice, and his friend Braccini came in, offering to produce him, and I let Mr. Braccini know that I would be glad to talk to Mr. Campanelli, but, of course, he was wanted by the Court; and after conferring with the United States Attorney about it, I suggested that Braccini bring Mr. Campanelli in and his bond would be fixed at about $2500. Then when he came into the office no promises of any kind were made.

The COURT.—Q. What did you say to him about that? A. About the bond?

(Testimony of Alf Oftedal.)

Q. No, about making a statement.

A. I asked him if he was willing to make a statement, and he said he was, and I questioned him in the presence of Mr. Braccini.

Q. Was there anything said to him about the statement?

A. I said to him, to begin with, what, in substance, I understood the facts to be.

Q. I mean what did you tell him about the statement? Did you tell him whether the statement would be used against him?

A. Yes, I let him know that any statement he would make would be used against [119] him, that I could not promise him anything, whatever, for making the statement.

Q. Did you tell him he was privileged to make a statement or not, if he saw proper?

A. Yes, that he was at liberty to decline to answer any questions I might ask him, that I wanted to interview him, and, in the course of this interview, when he made statements, immediately after I understood his answers I dictated them in the presence of Mr. Guido, Mr. Campanelli, the stenographer, and myself.

Mr. TULLY.—Q. Getting back to the time he first came into the office, at that time his bond was fixed in the sum of $10,000, was it not?

A. I believe it was.

Q. As a matter of fact, didn't you promise him, if he would make this statement, that you would reduce the bond to $2,500?

(Testimony of Alf Oftedal.)

A. The statement had nothing to do with the bond.

Q. Just answer the question.

Mr. GILLIS.—I think he is answering.

A. No.

Mr. TULLY.—Q. You did not? A. No.

Q. What connection, if any, has this man you refer to as Guido Braccini got with your office?

A. None whatever.

Q. Do you know whether he purports to work out of your office at any time?

A. If he does so, he does so without authority of any kind.

Q. Doesn't he assist you in investigations?

A. None whatever, except he is one of those fellows from whom we occasionally obtain information.

Q. Doesn't he act as an informer for your office?

A. On a salary, no.

Q. No, I am not asking on a salary.

A. As an informer, that is not correctly stating it, because anyone that gives information, I would not call them an informer—I expect that they are informers—I would not just designate him as an informer.

Q. What is his connection in that regard with your office?

A. He is just a man with whom I became acquainted in connection with another case in which Campanelli was involved. [120]

Q. That was the Crawford case, was it not?

A. Yes.

(Testimony of Alf Oftedal.)

Q. You granted him immunity in that case, did you not?

Mr. GILLIS.—Just a minute; may it please the Court—

The COURT.—That does not involve whether that statement is voluntary or not.

Mr. TULLY.—I am trying to find out who this man Guido is.

The COURT.—You can do that on cross-examination.

Mr. TULLY.—I will pass it until that time, and reserve my right to cross-examine him then.

The COURT.—The particular inquiry now is whether or not it is a voluntary statement.

Mr. GILLIS.—Will you read the statement, Mr. Oftedal?

The witness read the following statement: [121]

November 5, 1924.

Joe Campanelli, when interviewed in the office of the Intelligence Unit, on November 5, 1924, in the presence of Guido Braccini, states

That he does not distinctly recall how he first became acquainted with Mr. Manning of the Colombo Buillion Mines Syndicate, about a year or so ago; that he did purchase several cases of whiskey, possibly fifty, from Mr. Manning, who, as he understands it, was only in San Francisco for two or three weeks.

That Manning made him acquainted with Henderson, with whom he had dealings from time to time, and at Henderson's invitation he visited at the lat-

ter's rooms in the Stanford Court Apartments, where he saw Ruth Adele Smith, whose picture he has identified and who Henderson spoke of as "Pat."

That it was Henderson who made him acquainted with Guyvan McMillan; that he got to be pretty well acquainted with Henderson, who was quite liberal with his funds and paid him sums of money at times amounting from $50,00 to $100.00, and on several occasions he purchased quantities of liquor from Henderson; that several months ago Henderson invited him, Campanelli, to go along on a trip to Havana, Cuba, for the purpose of obtaining liquors, and in that connection he learned that Henderson owned a ship called the "Giulia," which was being sent to Havana for the purpose of securing a cargo.

That he went along with Henderson on a trip to Havana at the latter's expense, and that Johnny De Maria joined them on this trip, which was made by train; that he (Campanelli) had no connection whatever with De Maria and as he understands it De Maria was making the trip for his own interests. Upon arrival of this party at Miami, Florida, Henderson met his wife who appeared to be living there at the Granada Apartments, and that the three men after spending about one week in Miami proceeded to Havana by the boat "Key West," where they registered at the Seville Hotel. Campanelli further states that in conversations which were had from time to time with Henderson he came to know

that a supply of liquors was being kept in storage at Havana, which belonged to Henderson, and although Johnny De Maria traveled along on this venture, he does not know to what extent De Maria was interested financially or otherwise.

He states that he stayed in Havana for fifteen or twenty days waiting the arrival of the steamer "Giulia," after which a cargo of liquors was placed on board; that the liquors which were placed aboard the "Giulia" were removed from warehouses located on what is known as the San Francisco Pier.

That Henderson seemed to have complete charge of the ship as well as her cargo; that Henderson gave him to understand that most of this liquor had been exported from Scotland where Henderson said he owned a distillery; that Johnny De Maria did not remain in Havana until the arrival of the "Giulia" but stayed in the city, as he recalls it, no longer than a week. Campanelli remained in Havana until the "Giulia" was loaded and he does not remember the date on which he left but says he proceeded to New Orleans, where he remained for two or three days. The girl, Ruth Adele Smith, *alias* "Pat" did not show up at Havana while he was there, he says, nor does he know when Henderson left there, but he is quite certain that Henderson did not [122] leave on the "Giulia." In parting with Henderson he was given instructions to proceed to San Francisco, and Henderson in referring to himself said: "I will be there before the boat gets there," or words to that effect.

Campanelli does not remember the date of his return to San Francisco, and asserts that he received no instructions at Havana with regard to making contract of any kind with the "Giulia" upon her arrival in the vicinity of San Francisco; that about twenty days or more after leaving Havana he (Campanelli) while at his own office in San Francisco at 17 Columbus Avenue, received a telephone call from Henderson, inviting him to the Clift Hotel on Geary Street. On this occasion they simply visited together in the room which was being rented by Mr. Henderson. On that occasion Henderson told him that there were about 8,500 cases of liquor aboard the "Giulia," and he would like to have Campanelli's assistance in the matter of disposing of the cargo. Henderson offered to pay him $1.00 a case as a commission for the assistance which he had rendered or might render with regard to the disposal of these liquors, and it was figured out that he would receive at least $8,500.00 on the deal.

Henderson stated that Alioto, a foreman for the Booth Fishing Co. of San Francisco, who had assisted in the unloading of liquors on previous occasions would help in the matter of unloading the "Giulia" and he (Campanelli) was requested to get in touch with Alioto, which he did. He states that he informed Alioto of Henderson's purpose to pay him at the rate of $2.50 a case for every one unloaded from the "Giulia," and that Alioto agreed to arrange for bringing in liquors from the ship at

that rate; he told Alioto that Henderson expected the boat to arrive on a certain fixed date, which he does not recall at this time.

That about one week after his visit with Henderson at the Clift Hotel, Henderson met with him again and they visited together in the office on Columbus Avenue, where he was informed of the fact that the "Giulia" was down in Ensenada in need of coal and provisions and that he, Henderson, would like to have him go down there to help in any way he could to supply the ship. He says that his cousin, Ricardo Campanelli, had no interest whatever, so far as he knows, in the cargo aboard the "Giulia," but at his request Ricardo gave him a ride by automobile from San Francisco to San Diego. On the way, however, they met with an accident near the city of Los Angeles, and had to make the remainder of the trip by stage to San Diego. The trip from San Diego to Ensenada was made by automobile.

That while in San Diego he met with Johnny DeMaria, but was not informed as to the latter's business down there.

That after arrival at Ensenada, he paid a visit to the "Giulia," which was then located in the harbor, and received a sum of money from Captain Hogan, with which he purchased a supply of groceries and other provisions which were transferred to the ship by means of a launch, which was hired for the purpose. Campanelli insists that he had nothing whatever to do with purchasing any

coal for the "Giulia" nor with transporting the coal to the ship.

That after these provisions were placed aboard he boarded the ship himself and stayed on her until after arrival, about thirty miles south of the Farillone Islands; that he was seasick and was very anxious to reach shore as soon as possible, and that while the ship was lying off the islands he was permitted to go ashore in the [123] first boat which came alongside; he did not notice that the boat had any name nor does he have any means of idenfying it except that he might know it if he saw it again. This launch did not remove any liquors from the "Giulia" so far as he knows, and he and his cousin Ricardo were the only passengers. They landed at Pier 17 or 21 at 5:00 or 6:00 o'clock in the evening.

That upon arrival he went to the office where he met with Henderson, who appeared to be waiting for him. In the course of this visit Henderson made inquiries with regard to the condition of the ship and the cargo and was assured that everything was alright. Henderson told him that the first lot brought ashore from the "Giulia" consisted of about 300 cases.

I, Joe Campanelli, hereby certify that the foregoing is a correct statement of the information given by me and furthermore that the statements I have made in this connection are the truth and nothing but the truth.

Signed: J. CAMPANELLI.

(Testimony of Alf Oftedal.)

Subscribed and sworn to before me this 5th day of November, 1924, at San Francisco, California.

ALF OFTEDAL,

Special Agent in Charge, Sacramento Division.

[124]

(WITNESS Continuing.)

Mr. GILLIS.—Q. Mr. Oftedal, did you have any other interviews with Mr. Campanelli, other than the one on November 5, 1924?

A. Two others as I recall.

Q. When was the next one?

A. As I remember it, early in the month of December, 1924.

Q. Was that a sworn statement that he made at that time?

A. No; that is, I questioned him orally in the presence of yourself and Mr. Creighton, and one or two others, in the office of the United States Attorney, in this building.

Q. Did you make a record of that conversation?

A. No, I did not.

Q. Do you remember what transpired at that time? A. Yes.

Q. Will you state what conversation you had with him then?

A. He had previously been questioned, that is, he was in the room when I went in, and I heard him make some answers to questions propounded to him by, I believe, Mr. Creighton; then I questioned him somewhat along the line that I had when he was over in my office previous to that time, and he just stated

(Testimony of Alf Oftedal.)

in further detail than he did when in the office, that a part of his arrangements—[125]

Mr. TULLY.—May we have the same objection to this testimony that we did to the other?

The COURT.—Yes.

Mr. TULLY.—And exception?

The COURT.—Yes.

A. A part of this arrangement that he had with this man Daniel Henderson was, he was to receive so much for each and every case delivered by the Henderson interests in California, or in San Francisco; and that his principal duty in that connection was to keep in contact with the shore boats that went out to the ship to get the liquor, and then to be at the point of delivery when a cargo was delivered at any particular residence, he would accompany the truck that made the delivery, and then he would collect from the purchaser, and he deposited these funds in the bank, or gave them direct to Mr. Henderson, either way—sometimes he said he carried large amounts of money for Daniel Henderson for days at a time; and then Daniel Henderson would arrange with him every so often to figure out how much was due as a result of the quantity unloaded from the ship "Ardenza," as well as the "Frontiersman" and the "Giulia." However, as far as the "Giulia" was concerned, he said that only two boatloads, as I recall it, had been delivered prior to the time that the boat was sunk, and that he had received his commission from those two de-

(Testimony of Alf Oftedal.)

liveries; he was questioned further with regard to his relations with John De Maria.

Mr. McDONALD.—We object to any statements made by this defendant concerning the defendant John De Maria, on the ground that they were made after the arrest of this defendant, and after the termination of the conspiracy, and ask that the jury be instructed to disregard them.

The COURT.—I think they understand.

A. And again he stated that Johnny De Maria had gone along with him on this trip from San Francisco to Havana, Cuba, but that while they traveled together they had no particular relations, that is, he did not pretend to know just what Johnny De Maria was going down there for, though the three of them, Henderson, [126] Joe Campanelli and Johnny De Maria traveled together on the train, and were together for several days in Miami, Florida, as well as in Havana. He was questioned, too, in detail, with regard to his association with Campanelli down here at San Diego and in Ensenada, and he said that he had seen Johnny De Maria down there.

Mr. McDONALD.—Q. Down there?

A. Down in Ensenada, as well as in San Diego. But, again, he claimed that there were no financial connections between them, and no particular relationship, so far as this deal was concerned.

Mr. GILLIS.—Is that substantially all?

A. That is substantially all of it.

(Testimony of Alf Oftedal.)

Q. Did you have any other conversation with him? A. Yes.

Q. Where was that? A. That was in my office.

Q. Was that reduced to writing? A. Yes.

Mr. WILLIAMS.—If your Honor please, just a moment; as I understand the reference to the defendant De Maria in the admissions of this particular defendant, Campanelli, are admissible to show the actions of acts of Campanelli, and not binding upon De Maria as such?

The COURT.—No.

Mr. WILLIAMS.—It is admissible with that limitation?

The COURT.—Yes, unless the jury should find that it subsequently appeared that De Maria was a party to the conspiracy, if there was one, of course this would show the association of the two together.

Mr. WILLIAMS.—But not to connect him with the conspiracy.

Mr. TULLY.—May I have the same objection to this testimony, and the same exception?

The COURT.—Yes.

Mr. GILLIS.—Q. Did he sign and swear to the statement that he last made?

A. No, he declined to; he said he had an attorney, and I asked him to take a copy of the statement over and show it to his attorney, and I said that his attorney might advise him to sign it, but he did not come back.

Q. Did you reduce it to writing?

A. Yes. [127]

(Testimony of Alf Oftedal.)

Q. Have you that? A. Yes.

Q. Using that only to refresh your memory, Mr. Oftedal, will you state what the substance of that conversation was?

Mr. TULLY.—May we see it?

Mr. GILLIS.—You have a copy of it.

Mr. TULLY.—No, I have not a copy.

Mr. GILLIS.—A copy was given to Mr. Campanelli. (Handing.)

Q. Using this to refresh your memory with, Mr. Oftedal, will you relate the conversation that you had with Mr. Campanelli at that time?

Mr. TULLY.—I suggest that the proper foundation be laid, your Honor, the time, place, and who was present.

Mr. GILLIS.—I am not impeaching this witness.

Mr. TULLY.—No, but I would like to know.

The COURT.—This is not offered for impeaching purposes. This is offered as a declaration against interest.

Mr. TULLY.—Yes, but I would like to have the proper foundation laid to know who was there.

The COURT.—What do you mean by a proper foundation?

Mr. TULLY.—I would like to have the witness state when it was.

Mr. GILLIS.—When did you make that?

A. On December 9, 1924.

Q. Was that when you had the conversation?

A. Yes.

Q. Go ahead and relate that conversation.

(Testimony of Alf Oftedal.)

A. Mr. Campanelli stated in the presence of Guido Braccini in my office at that time, and at the same time that I obtained the information from him I dictated it to my stenographer in my office, and as a result made up this memorandum for his signature, and it states in substance, that is, he said in substance that sometime in the spring of 1923—

Mr. TULLY.—I submit this is not a signed statement, and the witness should only use it to refresh his memory.

The WITNESS.—That is all I am doing. [128]

The COURT.—Go ahead.

A. At some time in the spring of 1923 he was introduced to a Mr. Manning, in the office of the Colombo Bullion Mines Syndicate, having offices down at 625 Market Street, as I recall it; that he learned from other sources that this man Manning was selling intoxicating liquors, so he, Campanelli, purchased quantities from him. He said that in all he had purchased about 50 cases of intoxicating liquor from Manning; that through Manning he became acquainted with Daniel Henderson, who also appeared there at the Colombo Bullion Mines office, and that Henderson, in turn, introduced him to Guyvan McMillan, who acted, as he said, as a sort of confidential agent or representative of Daniel Henderson. Later on he purchased liquor direct from Henderson, who was then stopping at the Stanford Court Apartments, and it was Henderson who invited him up to the Stanford Court Apartments, where they got to be better acquainted, and as they

(Testimony of Alf Oftedal.)

became better acquainted Henderson entrusted him with sums of money; that he was to receive $1 for each and every case delivered from these certain ships, the "Ardenza" and the "Frontiersman," whether he, Campanelli, took part in the sales, or not. That his principal duty was to appear at the point of delivery to collect the money due in payment for the liquor, and sometimes at Henderson's suggestion he deposited such money to his own bank account; at other times he would proceed to the Stanford Court Apartments, or to his own office, and make settlements with Henderson as a result of these liquor sales. That early in the year 1924 Henderson informed him of his plans for making a trip to Havana, Cuba, for the purpose of obtaining some liquor; he was advised of the fact that the steamer "Giulia" would make a trip to Havana for the purpose of loading up liquor to bring around to California; that when they started out on this trip sometime, as he recalled it, in the month of April, 1924, for Miami, Florida, he went along on the train in company with Henderson and Johnny De Maria, and Mr. Henderson, De Maria and himself spent about a week in Miami, and then proceeded to Havana by means of the steamer "Key West," and upon arriving at Havana they registered at the [129] "Seville Hotel." He says he stayed in Havana for 15 or 20 days, and during that time had frequent visits with Henderson; that Henderson showed him a certain warehouse there in Havana in which he, Henderson, kept a supply

(Testimony of Alf Oftedal.)

of liquor, which, according to Campanelli's understanding, had been transferred to that point from Scotland; while there the "Giulia" arrived, and he helped Henderson in the matter of loading the ship with about 8400 cases of intoxicating liquor, all of which were removed from the warehouse located on what is known as San Francisco Pier; that Henderson seemed to have complete charge of the ship, as well as with the cargo. Johnny De Maria did not remain in Havana very long, perhaps not more than a week; he does not recall just what became of Henderson, but he thinks he must have returned to Miami before he proceeded to San Francisco. Campanelli said he stayed in Havana until the "Giulia" had loaded, and then proceeded to New Orleans, remaining there two or three days; he says he returned to San Francisco by rail, traveling alone, and he does not recall the date of his arrival here. About 20 days or more after leaving Havana he was in his own office at 17 Columbus Avenue, in this city, when he received a telephone call from Henderson in the city asking him to join the latter at the Clift Hotel on Geary Street; that on that occasion he told him there were about 8500 cases of liquor aboard the "Giulia," and assistance was desired in the matter of disposition of the cargo; that Henderson offered to pay him $1 a case as a commission for such assistance as he had rendered, or might render in the future, with regard to the disposition of this cargo in San Francisco; and it was estimated between them that he should receive at least $8500

(Testimony of Alf Oftedal.)

as his share on the deal. Henderson told him Alioto, the foreman for the Booth Fishing Co., of San Francisco, who had assisted in unloading liquors on a previous occasion, would help him in transferring cargoes from the "Giulia" to points along the shore, and he, Campanelli, was requested to get in touch with Alioto to arrange certain details with him; that he was authorized to tell Alioto that it was Henderson's purpose to pay him at the rate of $2.50 for each case of liquor unloaded from [130] the "Giulia"; that Alioto agreed to do the work, and he, Campanelli, informed him of the date when Henderson expected that the boat would arrive off the coast of California—the boat "Giulia"; about one week after his visit with Henderson at the Clift Hotel, he met Henderson again in his office on Columbus Avenue, and informed him that the "Giulia" was down in Ensenada, Mexico, in need of coal and provisions, and that he, Henderson, would like to have him go down there and help in any way that he could to supply the ship with necessaries; that his cousin, Ricardo, Campanelli, offered to give him a ride to Los Angeles in his automobile; that they started out together, and when near Los Angeles they had some accident which made it necessary for them to go by stage from there on, and then from San Diego they went to Ensenada. Upon his arrival in Ensenada he learned, he said, that the "Giulia" was anchored in the harbor, and he communicated with Captain O'Hagan. Joe Girbando, the supercargo of the "Giulia," was in the city of Ensenada, for the purpose of supply-

(Testimony of Alf Oftedal.)

ing the "Giulia" with groceries and other provisions. The ship was anchored only a short distance from the shore, so he, Campanelli, went out there and spent a little time with the captain, as well as with the supercargo, "Girbando." A small boat named the "Grane," supplied the ship with coal while he, Campanelli, was there. About two or three days after his arrival at Ensenada, the "Giulia," started out on her voyage north, and Campanelli was aboard her; he became seasick upon arriving at a point about 30 miles south of the Farallone Islands, and was permitted to go ashore in the first boat that came alongside; he does not know the name of this boat which took him ashore, but only knows that the captain of her went by the name of Jack. This launch did not remove any liquor, so far as he knows. His cousin, Ricardo, was the only passenger besides himself. They landed at pier 17 or 21 at about five or six o'clock in the evening. Promptly after his arrival here in San Francisco he went to his own office on Columbus Avenue and he found Daniel Henderson there waiting for him. In the course of the visit Henderson told him that one load of liquor consisting of about [131] 300 cases had been brought ashore from the "Giulia." At Henderson's direction he, Campanelli, made one trip out to the "Giulia" by means of the launch "Gnat," transferring some provisions to the ship. Guyvan McMillan arranged for supplying the "Giulia" with coal. No liquor was brought in on the "Gnat" while he was aboard of her on the first trip. He said he learned from Hen-

(Testimony of Alf Oftedal.)

derson that three loads of liquor were removed from the "Giulia" by means of the "Gnat," which was operated by Alioto. He saw Henderson on several occasions after the arrival of the "Giulia" off the Farallone Islands, but did not take part in the removal of any of the liquor from the "Giulia," nor in the disposition of the liquor about the city. Henderson disappeared promptly after the newspapers published the story about the sinking of the "Giulia" and the arrest of the crew.

Q. Is that all of the conversation that you had?

A. That is all, the conversation.

Mr. GILLIS.—You may cross-examine.

Mr. CONNOLLY.—Will the Court instruct the jury with reference to Captain O'Hagan, to disregard it?

The COURT.—I think the jury understand that.

Cross-examination.

Mr. TULLY.—May I have that statement, Mr. Oftedal, and the previous one? A. Yes.

Q. Now, going back to the first statement, Mr. Oftedal, that you procured from the defendant Campanelli, I believe you said this morning that Campanelli came to your office with Mr. Braccini?

A. Yes.

Q. I asked you the question this morning just what connection or relationship, whatever way you want to designate it, did Mr. Braccini have with your office at that time? A. Yes.

Q. Now, what is that relationship?

A. None, whatever, except such relationship as

(Testimony of Alf Oftedal.)

perhaps Campanelli has had; that I have questioned Campanelli for information with regard to our work, as I have questioned Guido Braccini; [132] the two have been associated together, and when I have had occasion to question Campanelli it has been my policy, because it has proved advantageous, to talk with Braccini first.

Q. Let me ask you this question: Did you send Mr. Braccini out to get Mr. Campanelli on the first occasion, I am speaking of now? A. No.

Q. You did not? A. No.

Q. Had you previously discussed with Mr. Braccini the case involving Mr. Campanelli?

A. I asked him this, if he could not locate Campanelli for us; I said that he was a fugitive from justice, and that he was wanted, and he said he thought that he could find him.

Q. You know as a fact, do you not, Mr. Oftedal, that Braccini went up to Broadway Street, in the city of San Francisco, and got Mr. Campanelli there?

A. I don't know what he did in the matter of getting him, because, as I recall it, Braccini refused to tell me where Campanelli was, and I never saw Campanelli, or knew where he was, until Braccini brought him into the office.

Q. Now, getting back to the relationship of Mr. Braccini with your office, you then did ask Mr. Braccini if he could not bring, or find, or locate Mr. Campanelli? A. Yes.

Q. How did you happen to do that?

A. Why, having learned in a previous case han-

(Testimony of Alf Oftedal.)

dled by our office, that Braccini knew a good deal about Campanelli's activities, it was natural to question Braccini as to whether he knew where Campanelli could be located.

Q. Does not Mr. Braccini render services or aid you in other cases?

Mr. GILLIS.—May it please the Court; I can't see the object of the question, and I object to it as immaterial.

Mr. TULLY.—It is very important.

The COURT.—He may answer the question.

A. Yes, I have questioned him with regard to other matters, but so far as rendering me assistance in any other cases that we have handled, I think that it is only in these two cases, in which Campanelli has been more or less involved, that he has rendered what you might call assistance. [133]

Mr. TULLY.—Q. Let me ask you this question: Didn't he actually aid you in the Greer Case, which is now pending at Sacramento?

Mr. GILLIS.—I cannot see that that is material.

Mr. TULLY.—I am trying to establish the connection of this man with his office, and I have a right to examine him.

The COURT.—I think you have the right.

A. If rendered any aid I don't know what it was; I did ask him if he could see if he could learn anything in regard to Greer's activites.

Q. Wasn't he in Sacramento acting under the direction of Mr. Parker, your associate, at the time that the matter was presented to the Grand Jury?

(Testimony of Alf Oftedal.)

A. If he was, I knew nothing about it.

Q. You know nothing about it? A. No.

Q. He did render aid and assistance to you and your office in the Crawford Case, did he not?

A. That was because he was involved—not any more, however, than did Campanelli.

Q. Answer the question: He did render you aid and assistance?

A. Aid in this way, that we depended upon him as a witness in the case, and we sought to produce Joe Campanelli as a witness.

Q. All right; did he render you aid and assistance in the Wolf Case?

A. None, whatever, that I know of.

Q. Did he testify and procure evidence for the hearing before the Grand Jury at Sacramento?

A. The Wolf Case involved, that is, it had a relation with—that is, the Crawford Case, and the Wolf Case—

Q. (Intg.) I understand that, but I am asking if he aided you.

Mr. GILLIS.—Let him finish his answer.

A. The two cases are related, the Wolf Case and the Crawford Case, and the cases of quite a number of other prohibition agents who were proceeded against for accepting bribes were all related, and Joe Campanelli paid a part, with Braccini, in those cases.

Mr. TULLY.—Q. Ever since the Crawford Case, then, Braccini has been [134] rendering you aid, your office, and reporting to your office?

(Testimony of Alf Oftedal.)

A. No, that is not true, because Braccini seldom comes to my office, except, when I ask him to come, and I sometimes ask him for information, just like I ask anyone else that I think may know something about the case in which we are interested.

Q. When did you see Mr. Braccini last?

A. I saw him just a few minutes before I came into this courtroom.

Q. Did you see him yesterday? A. No.

Q. Don't you know the marshal was looking for him and didn't find him, to serve a subpoena, until today?

A. I never knew anything about it; I never knew he was being subpoenaed.

Q. You did discuss, then, with Mr. Braccini, whether he could find Mr. Campanelli, who, you understood was a fugitive from justice—whether he could not find him and bring him to your office?

A. I did not ask him to find him and bring him to the office; I asked him to locate him for us if he could, and let me know where Campanelli was; as I recall it, that was my first purpose in talking with him.

Q. He did locate him and bring him to your office, did he? A. Yes.

Q. How long after you told him that you wanted him to locate Mr. Campanelli did he bring Mr. Campanelli to your office?

A. Well, I think it was two or three days, as I recall it, after he first made the overture to me that he knew where Campanelli was, and he would be glad to bring him in for me, only that Campanelli

(Testimony of Alf Oftedal.)

could not put up $10,000 bond, and wanted to know if that bond could not be reduced.

Q. Now, do I understand you correctly yet, did you first suggest to Mr. Braccini trying to locate Mr. Campanelli, or did Mr. Braccini bring the subject up with you?

A. As I recall it, immediately after I became aware of the fact that Campanelli was more or less involved in this case, I asked Braccini to come to the office, and I questioned him as to where Campanelli was, and he said he did not know where he was. Now, my best recollection of it is that it was at least a month, possibly a month and [135] possibly a month and a half after that before Braccini voluntarily came to my office and told me he knew where Campanelli was, that Campanelli was willing to come in and give himself up under the circumstances that I have related.

Q. Then, as a matter of fact, you first took the matter up with Mr. Braccini?

A. So far as locating him was concerned.

Q. Yes; and Mr. Braccini did not originally, then, bring Mr. Campanelli in as a friend of Mr. Campanelli's?

A. When he came into the office—

Q. (Intg.) No, just answer the question. Read it back to him.

The COURT.—How does he know whether he brought him in as a friend of Campanelli's, or not?

Mr. TULLY.—He testified to that this morning.

A. Will you put the question again? I will have to qualify the answer in order to make it.

(Testimony of Alf Oftedal.)

Q. Read the question. (Last question repeated by the reporter.)

A. Yes, because Braccini had always represented himself to be a friend of Campanelli, and as one seeking to look after the interests of Campanelli; that has been our whole relationship, so far as Campanelli is concerned.

Q. Mr. Braccini is also a friend of yours, too, is he now?

A. I would not say he was otherwise; I hope he is not otherwise; if he is unfriendly I do not know it.

Q. Now, when Mr. Braccini came in with Mr. Campanelli—just a minute—did you endeavor to locate Mr. Campanelli, yourself, prior to Mr. Braccini? A. Yes.

Q. Did you ever go up Broadway Street, in this city?

A. Yes, I went to—whether it was Broadway Street, or not, I would not say, but we learned, and I knew where he had previously been located, and I sent an agent there and found he was not there, and then I sent him to the home of where I understood Campanelli had lived with his parents some time previous.

Q. You knew Mr. Campanelli at that time?

A. I had seen him, because I [136] had interviewed him once previously, as I said, in my office, in the presence of Braccini.

Q. You did not go up personally to see if you could find him? A. No, I did not.

(Testimony of Alf Oftedal.)

Q. Now, when Mr. Braccini and Mr. Campanelli came to your office together, were you the first person they saw?

A. So far as I know, yes.

Q. They went directly into your office?

A. Yes.

Q. What was the first thing that was said there then?

A. As I recall it, I joked a little with Campanelli, and let him know how we had been striving to locate him for some time.

Q. What did you say, that is what I want, Mr. Oftedal.

A. It is pretty hard for me to recall just what it was, because I remember it was small talk to begin with, but what I do recall, however, is, when we got right up to the subject of my interview with him—

Q. (Intg.) What did Mr. Braccini say, if anything, there? Did you speak first, or did Mr. Braccini?

A. I cannot recall that now as to who spoke first, just what was said, because, as I say, I recollect it was a lot of small talk to begin with, and Campanelli seemed in quite good humor, and so did Braccini, and I recollected then I had seen Braccini before and spoke to him sometime about the previous occasion when he was in my office, and when we had wanted him at that time he had disappeared.

(Testimony of Alf Oftedal.)

Q. Who brought up the subject of making this statement? A. I did.

Q. What did you say in that regard?

A. First I said to him, I outlined what I understood to be the facts in the case; I says, "Now, here is what we know about this case, Campanelli," and I went ahead and outlined in substance what has been presented here, tending to show how the "Giulia" operated, and I knew of this trip that Campanelli had made, as I recall it I had learned about that trip to Havana, and I said, "Now, I want to question you some about this matter, and you understand that you are about to be proceeded against for this violation that is charged against you, and anything [137] you say may be used against you. Now, I am going to ask you some questions, and if I ask any questions which you do not want to answer you have a right to decline." And he said he was perfectly willing to tell the whole story, and what he wanted me to understand was that he was only a minor offender, and that the big dealer was Henderson; and he showed me some spirit of animosity toward Henderson. Then after I had questioned him a little I asked him if he was willing that we should make a record of the interview, and he said that he was, and I called in the stenographer, and I would turn and question him again over the same field I had already covered partially, and when I understood in sub-

(Testimony of Alf Oftedal.)

stance what he had to say that I thought was material I would dictate it right there in his presence to the stenographer; and that is the way this whole statement, the first statement, was procured.

Q. In that conversation did either you or Mr. Braccini say anything about granting him immunity for making this statement?

A. Nothing, whatever.

Q. Did you tell him that you might want him to be a witness?

A. I said that we might want him as a witness in this case, because he made a statement that he wanted to plead guilty, and get out of it as light as he could.

Q. He made that statement to you? A. Yes.

Q. You said that you might want to use him as a witness? A. Yes.

Q. Did you tell him if he would plead guilty that you would go to the judge trying the case and see that he was fined $300?

A. No, I never said that to him.

Q. Did Mr. Braccini say that?

A. No, not in my presence.

Q. Not in your presence? A. No.

Q. Now, originally, the statement that you made, or the conversation that you had was by way of questions and answers? A. That is it.

Q. Was that taken down by a stenographer?

A. Not the questions and the answers, because every once in a while, when he goes to make an

(Testimony of Alf Oftedal.)

answer, he [138] drifts out into Italian, that is he did while Braccini was there, and he does not make a direct answer to questions; he understands English very well, and can talk quite fluently when he wants to, but I found that when I tried to make a record of the interview by putting it in the form of question and answer, that he drifted too much away from the subject and I thought the way to expedite the interview was to simply put in substance what he had to say.

Q. Did you take any part of it down in question and answer form? A. No.

Q. In other words, you did not try to reduce it to writing?

A. The girl may have done so, because, as I recall it, I questioned him some time in the presence of the stenographer before I made the record that we have of the interview.

Q. Have you any of those notes?

A. I have none, but it is possible that the stenographer has.

Q. You had a stenographer there from the beginning, did you not? A. Yes.

Q. And all of the preliminary questions were submitted there in her presence, were they?

A. I would not be sure that she was in during the whole part of the first questioning, because as I recall it, I went over the field a little, before I called her in, or it may be that she was pres-

(Testimony of Alf Oftedal.)

ent during the whole time, from when I started to interview him.

Q. At the time that Mr. Campanelli went to your office, there was a warrant out for him, was there not?

A. There had been for some time.

Q. And his bail was fixed in the sum of $10,000, was it not?

A. That is what I know from hearsay, yes.

Q. He did not hesitate to come to your office, did he, with Mr. Braccini?

A. I do not know about that.

Q. He walked right in in daylight, didn't he?

A. He came right in voluntarily with Braccini, I thought.

Q. Don't you know, as a fact, Mr. Oftedal, that Mr. Braccini told him that he would be given immunity if he would make a statement?

A. No. [139]

Q. Didn't Mr. Braccini ever convey that to you?

A. He never gave me any such idea, because Braccini knows very well, from my previous conversations with him along this same line, that such a thing as granting immunity, or promising any reward or consideration for giving a statement is out of the question in our office.

Q. Don't you know as a fact, Mr. Oftedal, that Mr. Campanelli was brought in there with the idea that he was to be a witness for the Government?

A. I could not see how he would get such an

(Testimony of Alf Oftedal.)

idea; he knew the extent to which he was implicated, and I do not see what could have made him think he was coming in as a witness, because he knew the indictment was out against him, and the purpose of his coming in was to give himself up on the consideration, and as a consideration for that that his bond would be reduced to $2,500, a bond that he could get.

Q. He knew Mr. Alioto had been in your office, didn't he?

A. Alioto had never been in my office.

Q. Didn't he make a statement?

A. No, not to me.

Q. You know he did make a statement?

A. I don't know anything about it.

Q. You don't know anything at all about Mr. Alioto?

A. I don't know whether Alioto made a statement or not. I suppose he did.

Q. He has not been indicted in this case?

A. I don't know.

Q. Why did you say to Mr. Campanelli then, "We might want to use you as a witness"?

A. Well, did I say that?

Q. You can refer to the record if you think that my statement is correct.

A. It is quite probable that I did make such a statement to him at the time when he said that he wanted to plead guilty.

Q. Did you make the statement, or did you not?

A. I may have done so, I would not be sure

(Testimony of Alf Oftedal.)

one way or the other; I might have said, "We may want to use you as a witness."

Q. Didn't you so testify here this afternoon?

A. I probably said that I might have said so.

Q. Don't you know whether you did, or not?

A. I would not be positive, but [140] I have a hazy recollection that I did, that we might want to use him as a witness. As I recall it, it just seems to me if I said that at all it was the last time I talked with him.

Q. Do you want to convey the idea to this jury that Mr. Campanelli came up to your office with Mr. Braccini for the sole purpose of getting this off his chest?

Mr. GILLIS.—I object to that. I think he should testify to facts.

The COURT.—I don't think that is a proper question as to what he wants to convey. Ask him what the facts are.

Mr. GILLIS.—I object to the question as not proper.

Mr. TULLY.—Q. Do you know why Mr. Campanelli came up to your office with Mr. Braccini?

A. To give himself up, is my understanding of it.

Q. He wanted to surrender? A. Yes.

Q. That is the only idea he had in coming to your office? A. That is it, exactly.

Q. Did he tell you so?

A. Well, I don't know that he told me so, because that was taken for granted, when he came

(Testimony of Alf Oftedal.)

in the office; that was what we were joking about, that he was coming in to give himself up, and that I had looked for him several times previously, and he had always been to parts unknown when we wanted him.

Q. I understood you, on your original testimony, to say that he was a fugitive from justice.

A. Yes.

Q. If he was a fugitive from justice, do you suppose he would voluntarily come in and surrender himself?

A. He was a fugitive from justice up till that time he made this proposition by Braccini, and I let Mr. Braccini know that I had talked this matter over with the United States Attorney, and that the United States Attorney was quite agreeable to reducing the bond to $2,500 if he would come in and give himself up.

Q. Did you make that proposition to Mr. Campanelli?

A. No, but I said to Mr. Braccini that I was assured by the United States Attorney's office that [141] the bond would be reduced to $2,500 if Campanelli would come in and give himself up.

Q. Did you have Mr. Campanelli placed under arrest when he came to your office at this time?

A. No.

Q. You made no effort to place him under arrest?

A. Here is what I did; I advised him to go over before the United States Commissioner and in Campanelli's presence, as I recall it, I telephoned to

(Testimony of Alf Oftedal.)

the United States Marshal that Campanelli was on the way over to appear before the Commissioner, and that if they wanted to serve a paper on him, he was voluntarily giving himself up, and that he would be in the Commissioner's office.

Q. You, personally, did not make any effort to arrest him? A. No.

Q. Or to detain him? A. No.

Q. Do you know when the warrant for the arrest of Mr. Campanelli was issued, whether it was before or after this visit?

A. I have not the slightest idea, only what I had assumed.

Q. You made the statement that you understood he was a fugitive from justice?

A. I knew that he was one of those in the indictment, one of those named in the indictment, and I knew the approximate date that the indictment was returned.

Q. Now, Mr. Oftedal, you stated that you informed Mr. Campanelli that any statement he might make might be used against him? A. Yes.

Q. And informed him of his other rights?

A. Yes.

Q. Why didn't you embody that in this agreement or this statement?

A. Well, that is the reason I called him in the second time, one of the reasons, that I did not like the form of the statement, it was obtained rather hastily, because I did not want to detain the commissioner, and wanted to get Mr.

(Testimony of Alf Oftedal.)

Campanelli to come over here—under ordinary circumstances that statement would have shown that he made the statement of his own free will and accord, without any reward or promise therefor, etc., but it was very hastily obtained, and he was nervous and anxious to get over this interview, so in that way I failed to state "free and voluntary" at the end of the statement, [142] as I usually do.

Q. Isn't it the uniform policy of the Government agents to put that in the first paragraph?

A. It is quite customary for some officers to put it in the first paragraph, and for others to put it in the concluding paragraph.

Q. You did not embody any of those remarks in this document, at all?

A. To the effect that he was giving the statement of his own free will?

Q. Free and voluntary? A. No.

Q. How long was he in your office.

A. I do not recall now, but I imagine it was, my recollection is it was at least an hour.

A. At least an hour? A. Yes.

Q. You did not have time within that hour to embody that provision in here?

A. Well, it was not the time; he was so willing about the whole thing that at the time the necessity for it did not occur to me; it never occurred to me for a moment that Campanelli would ever deny the statement that he was making to me at that time, because his whole demeanor was that he wanted to

(Testimony of Alf Oftedal.)

give himself up, wanted to plead guilty and make a complete confession of it.

Q. For that reason you left out the statement in there to the effect that he was informed of his rights?

A. His willingness, his apparent demeanor at that time, or willingness to give himself up and tell everything is what induced me to leave it out; that it, I would have considered that an essential point if he had shown any hostility toward the interview at all.

Q. Now, you say you had another interview with him on or about December 9, 1924? A. Yes.

Q. But preceding that, you had interviewed him in this building? A. Yes.

Q. Who brought him to this building?

A. As I recall it, during the first interview he had promised to bring in to me a lot of cancelled checks, and other evidences of his financial transactions with Daniel Henderson and others like McMillan; and he promised me faithfully that he would bring them in a day or two after that first interview on November 5, I believe it was, he failed to [143] appear, and I asked Braccini several times about that, when Campanelli was going to come in and give these checks, and, as I recall it now, Braccini said that Campanelli had left his cancelled checks at some distant point, I believe it was up on this ranch where he was in hiding before he gave himself up, and that when he could get these cancelled checks he was going to bring them in. Well, now, as to just how Campanelli and Braccini

(Testimony of Alf Oftedal.)

happened to go to the District Attorney's office at that time, I do not recall, but I suppose that I had asked Braccini to ask Campanelli to come in again.

Q. And you expected him to aid the Government again by bringing in other cancelled checks?

A. Yes.

Q. And you had Mr. Braccini get in touch with him again and see why he did not bring the checks in?

A. That is only a recollection, because it seems to me that every time that Campanelli did come in, all three times, that I did ask Braccini to ask Campanelli to come in.

Q. In other words, you did not deal directly with Mr. Campanelli when you wanted him?

A. I never could find him.

Q. You sent Mr. Braccini to get him?

A. I tried to find him and never could; that is the reason I always had to locate him through Braccini.

Q. He was out on bond, was he not, at the time of your interview here in the District Attorney's office? A. Yes.

Q. You never tried to ascertain his whereabouts from the bond, did you?

A. Well, we may have done that; I had some agents working on all phases of the case, and they may have looked into the bond.

Q. Now, coming down to this interview on December 9, 1924, you sent Mr. Braccini out again to bring in Mr. Campanelli, did you not?

(Testimony of Alf Oftedal.)

A. As I recall it, every time Campanelli came in it was as a result of my request of Braccini, asking him if he could not locate Campanelli, and ask Campanelli to come in; there was no bringing in, there was no arrest, no compulsion about it, that I know of, because Campanelli was always willing to come, apparently, when he came with Braccini. [144]

Q. Now, on this last interview, which you had with him, you asked him to execute another statement, did you not, embodying some of the provisions or statements in the prior one, and some additional ones?

A. Yes; I said I was not satisfied that he was giving me all the information that he could give in the first one, not in the second interview.

Q. Now, why did you want that second statement, Mr. Oftedal?

A. Because the statements which he had made in the office of the United States Attorney about these deliveries, the circumstances under which these deliveries of liquor were made in the city, and the part he played in collecting the money, etc., was quite material to an investigation which we were then making of an income tax liability, and, furthermore, it was important for me to get this statement in more comprehensive form, and show, if I could, a little more of the relationship between Campanelli and these other men like Guyvan McMillan, Guy Manning, and Johnny De Maria.

Q. What was the first thing that you said to Mr. Campanelli when he came in on this last occasion on December 9?

(Testimony of Alf Oftedal.)

A. I said, as I recall it, Now—one of the first things I said was, he had disappointed me a good deal in not bringing in the cancelled checks, and he said he had found they had all been destroyed, and I said I doubted that statement very much, because he had assured me so faithfully in the first interview that he had those cancelled checks, and other evidence of his financial dealings with Henderson; that is the way, as I recall it, the conversation started.

Q. What did you say to him with reference to this last statement?

A. I said that I would like to get another statement from him, that I felt that he was holding back information on me, and that we had gathered some additional evidence since my first interview with him, and I wanted to see whether he was going to show good faith, as he had promised to do in the first instance, by telling the whole story.

Q. Did you submit to him questions which were answered on this last occasion?

A. No; on the last occasion I placed the affidavit in different form, that is, I dictated the affidavit in the first person, in order that I might pin him down [145] to details on those points that I thought were quite material, and I further wanted to satisfy myself that he was going to act in good faith, or was going to decline to give us any information; I wanted to satisfy myself then and there as to whether he was being influenced to take a stand to protect the other defendants in other

(Testimony of Alf Oftedal.)

words whether he was going to give me all the information which he had promised.

Mr. WILLIAMS.—I ask that that go out, about protecting the other defendants.

The COURT.—The jury will disregard that statement about protecting the other defendants.

Mr. TULLY.—Q. Then you expected and relied upon Mr. Campanelli to furnish you such information?

A. I sought information from Campanelli, because I believed that he had a lot of available information that he could give, and he seemed very willing to give it on the first occasion.

Q. You say you expected him to act in good faith?

A. Good faith in this that he had agreed to tell me everything, and to give me all the evidences of his relations with these other men, and this "Giulia" affair, and he had failed to do so, and in that he was failing to show his good faith.

Q. Did he say anything about being promised immunity which he was not being given?

A. He never said a word about immunity, because Campanelli knew better than to suggest such a thing to me, because he had been interviewed by me on a previous occasion in connection with the Crawford Case, and knew such a thing as granting immunity was out of the question.

Q. Did you say anything to him in this statement of December 9, 1924, about why you were not going to use him as a witness?

(Testimony of Alf Oftedal.)

A. Not a thing was said about why I was not going to use him as a witness, because I had not either notified him that I was going to use him as a witness, or anything else; but he had sent Braccini in to convey some message to me, that he would like to have me say that, and he wanted Braccini to find out from me if I could not promise him immunity if he would plead guilty, that he wanted to plead guilty, but I let [146] Braccini know that nothing like that could be done.

Q. Do you know if Braccini conveyed to him any information to him as to what you said you would give him if he would come in and make another statement?

A. No, because Braccini and I never discussed what might be given to Campanelli by way of punishment; that is, I do not pretend to speak for the Court as to what kind of a sentence he would get regardless of whether he pleaded guilty or stood trial.

Q. Did Mr. Braccini ever tell you that he had informed Mr. Campanelli that if he should make this statement you would go to the court trying this case and see that Mr. Campanelli was fined $300?

A. I never said that to anyone, because I have never gone to the Court to seek a fine or a reduction of sentence for anyone.

Q. Do you know whether Mr. Braccini had represented you as making that statement?

A. If he did, I know nothing about it, and he had no authority to do it.

(Testimony of Alf Oftedal.)

Q. Now, Mr. Oftedal, I notice this last paragraph on this statement of December 9, 1924: "I, G. Campanelli, *alias* Joe Campanelli, hereby certify that the foregoing is a true record of the statements dictated to the stenographer in my presence, and I further certify that everything contained in this record is the truth, and nothing but the truth regarding my relations with Daniel Henderson, and the smuggling expedition of the steamer 'Giulia.' I have made this statement of my own free will and according, realizing that the statements contained herein may be used against me in the event of trial." You added that paragraph to this statement?

A. Yes.

Q. Why didn't you put it in the first one?

A. I have already explained that.

Mr. GILLIS.—That has already been asked and answered two or three times.

The COURT.—He explained that very distinctly and clearly.

Mr. TULLY.—In other words, you had made up your mind to put this in this last one, anyhow?

A. I always put a certification of that kind in a [147] statement; I don't know when we ever obtained a statement from a witness before without having it show that the witness makes the statement freely and voluntarily, without reward or promise therefor, or duress, etc.

Q. Now, this statement of December 9, 1924, I understand you had prepared.

(Testimony of Alf Oftedal.)

A. That statement that you have there is December 9?

Q. 1924, yes.

A. I dictated it to the stenographer—it was dictated under the same circumstances as the first one, that is, Campanelli was questioned in the presence of the stenographer, and when I understood in substance what he was saying with regard to any particular point, I dictated for him in the first person there to the stenographer, and he agreed that everything in it was true, and after that statement was obtained, and after the certification was added on to it, I read it aloud to Campanelli very carefully, piece by piece, and he agreed that everything in it was true He said that his attorney had instructed him not to sign any statement, and I asked him then to take this copy, which I presented to him, over to his attorney, and show it to him, and I said I thought his attorney might advise him to sign it.

Q. Was Mr. Braccini there when you gave that direction? A. Yes.

Q. You sent Mr. Braccini with Mr. Campanelli with this copy of this instrument to the attorney's office?

A. I did not send him, because that is where they said that they were going, and if I said anything, it would be along this line, I might have said this—I might have said, "Well, now, all right, if you do not want to sign this statement, you just take this copy over and show it to your attorney; I do not want to take any undue advantage of you, and after you have talked it over with your attorney

(Testimony of Alf Oftedal.)

perhaps he will advise you to come back again and sign it, and if you do not sign it, of course, that is your privilege; you are not obliged to sign anything.

Q. Didn't he tell you before he left the office that some portions of this he could not swear to, because they were not the truth?

A. He never said such a thing; in fact, he said everything in there was the absolute truth. [148]

Q. Well, now, you know Mr. Braccini left your office with a copy of this statement with Mr. Campanelli, to go over and see the attorney for Mr. Campanelli?

A. Mr. Campanelli did not seem to want to take the copy along with him, and when I passed it to him, as I recall it, he left it lying there on the desk, and Mr. Braccini picked it up.

Q. Did Mr. Braccini ever report to you that he had gone to the office of the attorney for Mr. Campanelli with Mr. Campanelli on that particular occasion?

A. He has never told me what the result of that thing was; I often wondered why Braccini never came back to tell me what did transpire when they took this copy away. I have never seen Braccini or Campanelli to discuss that subject with them since.

Q. You saw Braccini many times since, did you not?

A. I have seen him perhaps three or four times since, but I knew that he did not have much control

(Testimony of Alf Oftedal.)

over Campanelli, because he had told me about that several times, so I did not hold Braccini in any way responsible, or wonder at it that they did not come back to sign that original statement, because Campanelli has done that every time that he has come into the office, he comes and is gone, and you cannot find him again unless you get him through Braccini.

Q. Now, Mr. Oftedal, did Mr. Braccini ever report to you that he had gone to the office of the attorney for Mr. Campinelli, and there reported that if Mr. Campanelli would sign this statement, you would see that Mr. Campanelli was granted immunity, and that the attorney informed Mr. Braccini and said to him to go back and convey the information to you that if you wanted Mr. Campanelli to testify to anything in this case you would have to subpoena him as a witness, in view of what had occurred before?

A. That is a pretty long question.

Q. Was any information to that effect conveyed by Mr. Braccini to you?

Q. No, none whatever; Braccini has never conveyed any such information.

Q. He has never mentioned the fact that he had called at the office?

A. No; if he did I do not recall it; I do not recall of his ever saying [149] that he went to the attorney's office in company with Campanelli.

Q. Did you take up with him to see why he had not?

A. No, I never have done that, for the reason I

(Testimony of Alf Oftedal.)

rather expected the thing to turn out just as it did.

Q. Now, Mr. Oftedal, there were other agents of the Government, were there not, working on this case, that is, customs officials?

A. I think so; I am quite sure that is true.

Q. Mr. Creighton was one of them, was he not?

A. Yes.

Q. I will ask you if you are aware of this fact, that shortly after Mr. Campanelli had refused to execute that agreement Mr. Creighton had Mr. Campanelli arrested on Broadway street—

Mr. GILLIS.—Wait a minute.

Mr. TULLY.—Let me finish.

Mr. GILLIS.—Counsel is trying to inject a lot of stuff into the record that does not belong there.

Mr. TULLY.—I have the witness here to prove it.

Mr. GILLIS.—I have a right to make an objection.

The COURT.—That is rather an unusual question. I have to rely on counsel's integrity.

Mr. TULLY.—Here is the situation, so that your Honor will have the situation—

The COURT.—You may ask the question; I hold you responsible for it.

Mr. TULLY.—I want to explain the circumstances, your Honor, why I am asking this question.

The COURT.—You ask the question. I do not care for any explanation of the circumstances. You take the responsibility.

Mr. TULLY.—Q. Do you know, Mr. Oftedal, that

(Testimony of Alf Oftedal.)

shortly after Mr. Campanelli refused to execute that statement that he was arrested by another Government agent without a warrant and put in jail? A. I know nothing of that kind.

Q. You know nothing at all about that?

A. No. [150]

Q. That was not with your knowledge or consent?

A. It would have never been done with my knowledge or consent.

Q. In other words, the agent who did that did it upon his own volition?

The COURT.—You are assuming it was done. That is why I was in doubt about it a moment ago.

Mr. TULLY.—I intend to prove it was done. The only thing I wanted to see was whether this man had anything to do with it.

The COURT.—Yes, he said he did not know anything about it.

Mr. TULLY.—Q. Mr. Oftedal did Mr. Braccini receive any pay or compensation for his efforts?

A. From me?

Q. From you the Government. A. No.

Q. He did all this freely and voluntarily?

A. Everything that I know of he has done free and voluntarily, without any compensation of any kind.

Q. Even on this other work that I have called to your attention, these other cases he has worked on?

(Testimony of Alf Oftedal.)

A. I do not know of any instance when he has received any compensation, except, as I recall it, we sent him along as an informer with a special agent in connection with an investigation of the Crawford Case, and I did arrange, I believe, to cover his expenses on those trips, and possibly paid him a small compensation; that is, if we did, we got authority to employ him as a special employee. Now, I just have a faint recollection of that. I will be glad to produce a record of it if it is wanted. I do not recall just now whether we paid him or not. I just think we did.

Q. I am not asking you to produce the record. All I want to know is whether he received compensation for that work.

A. I think we paid him for possibly six days at the most; I do not think we could have paid him any more than six days and expenses, and that was in the early stages of the Crawford investigation; more than two years ago.

Q. In this work that you carried on in Sacramento, was he ever paid for it?

A. Never has been, with my knowledge and consent, no. [151]

Q. This first statement, Mr. Oftedal, was made on November 5, was it not?

A. I believe that is the date upon my statement.

Q. Yes, that is the date that appears on it.

Mr. TULLY.—May I have the indictment, Mr. Clark? The indictment bears the file date of November 12, 1924; the bonds of the respective de-

(Testimony of Alf Oftedal.)

fendants are endorsed as follows: Daniel Henderson, $10,000, McMillan, $10,000, Holmes, $10,000, De Maria, $10,000, Gueseppi Campanelli, $2,500; Ricardo Campanelli, $2,500.

Q. Mr. Oftedal, was that bond of Mr. Campanelli's fixed upon that indictment with your consent and suggestion at $2,500?

A. I doubt it, for I had no control over that thing at all.

Q. Did you suggest it to the District Attorney's office?

A. I might have done that, because I recollect that I did suggest some high bonds in some of these cases, but I don't think it was in this case; I think it was in the "Quadra" case.

Q. Mr. Oftedal, did you see Mr. Braccini yesterday? A. No.

Q. You did not see him at all yesterday?

A. No; if I did I do not recall it. I am quite sure I did not.

Q. You would recall if you saw him yesterday?

A. If I passed him on the street and saw him I might not recall it.

Q. Let me ask you this question: Did you speak to him?

A. I am quite certain I did not speak to him.

Q. You did not speak to him?

A. I am quite certain of that. If I did, I do not recall it.

Mr. TULLY.—That is all.

(Testimony of Alf Oftedal.)

Redirect Examination.

Mr. GILLIS.—Q. Before the indictment was returned, there was a complaint filed before the Commissioner, in which the bond of Mr. Campanelli had been made at $10,000: Is that not true?

A. Yes. [152]

Q. It was the bond before the United States Commissioner that was reduced from $10,000 to $2,500? A. That is it.

Mr. GILLIS.—That is all.

Mr. TULLY.—That is all. [153]

TESTIMONY OF PLINIO COMPANA, CALLED AS A WITNESS FOR THE UNITED STATES.

PLINIO CAMPANA, called as a witness for the United States, being duly sworn, testified as follows:

Mr. GILLIS.—Your business is what, Mr. Campana?

A. I am with the Mercantile Trust Co., manager of the Broadway and Grant Avenue office.

Q. Have you with you a bank statement of Mr. G. Campinelli? A. I have.

Q. Will you produce that, please? A. Yes.

Q. That runs for what period of time?

A. July 21, 1923, to August 28, 1924.

Q. Do you know Mr. Campinelli? A. Yes.

Q. He is the gentleman who sits behind Mr. Tully at the table? A. Why is Mr. Tully?

(Testimony of Plinio Compana.)

Q. Mr. Tully is the first man, here, in the black suit. A. Yes.

Mr. GILLIS.—Mr. Campinelli sits behind him? A. Yes.

Q. These are the records of the bank, and taken from the records of the bank? A. Yes.

Mr. GILLIS.—I ask that these be admitted in evidence and marked Government's exhibit next in order.

Mr. TULLY.—Objected to on the ground that they are immaterial, irrelevant and incompetent, and no foundation [154] whatever laid, nothing to show this man kept the records, or knows anything about them. It has also to do with an account in the year 1923, long prior to the date fixed in the indictment.

The COURT.—What is that?

Mr. GILLIS.—It is a complete record of this man's account at the bank, from July 21, 1923,—to when?

The WITNESS.—From the date it was opened to the date it was closed.

Mr. TULLY.—Absolutely no foundation laid, nothing to show this witness had anything to do with it, with the entries, or the keeping of the account.

The COURT.—That is a bank record?

Mr. GILLIS.—That is a bank record.

The COURT.—It will be admitted.

Mr. TULLY.—Exception.

(The document was marked U. S. Exhibit 10.)

(Testimony of Plinio Compana.)

Mr. GILLIS.—Have you made a total of these deposits made from this? A. Yes.

Q. What is that total?

A. I just made a total of the deposits.

Q. A total of the deposits is what?

A. $157,611.02.

Mr. TULLY.—The same objection and exception.

The COURT.—Yes.

Cross-examination.

Mr. TULLY.—Who kept that account, Mr. Campana?

A. What do you mean, who kept the account?

Q. In the bank. Did you keep that account in the bank yourself? [155]

A. I am the manager, and the bookkeeper keeps the account.

Q. Who kept that account? Did you keep it personally?

A. I can't keep them; we have a bookkeeper, we hire a bookkeeper, and he runs the account, and then we have another bookkeeper that runs the statements, it is run twice.

Q. In other words, you personally had no contact with that account at all, other than that of manager of the bank?

A. I know that the account is there, and I check up the checks that come in and out.

Q. Did you make any of these entries on that slip of paper?

A. What do you mean, on that slip of paper?

(Testimony of Plinio Compana.)

Mr. GILLIS.—I think that is immaterial, whether he did or not.

Mr. TULLY.—There are three separate papers here. Did you put down any of these figures on these papers?

A. I run the adding machine lots of times.

Q. Answer my question. A. Yes.

Q. Point them out, what ones?

A. I can't tell you the ones.

Q. Then why did you say "Yes," if you could not tell me?

A. I could not pick out the ones exactly; I do not think you could pick out anybody's in the bank exactly.

Q. Then you don't know exactly which one?

A. I say that I do know that I made some of the entries.

Q. Pick out the ones?

A. I could not pick out the ones. [156]

Q. You cannot pick out any items in this account?

A. No; here is the reason why, my bookkeeper might be sick, so I run the book that day. Now, I cannot go and tell the day that I went to run the ledger account.

Q. You cannot name one single item in it, then, that you entered?

A. I can't pick it out exactly, no.

Q. You can testify that you did not make them all?

A. No, I did not make them all, I am sure.

(Testimony of Plinio Compana.)

Q. You have a bookkeeper there who usually keeps the books? A. Yes.

Q. Unless he happens to be ill, and then you may make an entry?

A. I might make an entry, or the assistant manager make an entry.

Q. Another person might make the entry.

A. Yes.

Redirect Examination.

Everything in the bank is done under my supervision and books are kept under me. [157]

TESTIMONY OF H. F. DUFF, CALLED AS A WITNESS FOR THE UNITED STATES.

I am an immigration inspector and the officer that delivered the members of the crew from the "Giulia" into the custody of the United States Marshal.

TESTIMONY OF CHRIS RUNCKEL, CALLED AS A WITNESS FOR THE UNITED STATES.

I am a deputy United States Marshal and received from the Immigration authorities, into the Custody of the United States Marshal, the crew of the boat "Giulia."

Mr. GILLIS.—Now, may it please the Court, that is the Government's case, with this exception. I will ask at this time that the exhibits have been introduced in evidence, referring to the papers

which were taken from Captain O'Hagan, of the "Giulia" and the Government's Exhibit 9, which refers to the King Coal Co. bill for delivery of coal to the "Mae Heyman" be introduced in evidence as against all defendants, subject, of course, to the instructions of the Court.

The COURT.—That is, as to all defendants that are alleged to be parties to the conspiracy?

Mr. GILLIS.—I mean subject, of course, to the Court's instruction as to the finding of a conspiracy by the jury.

Mr. TULLY.—We make the same objection and take an exception.

The COURT.—I think that is all right as to all matters except that letter that was written in Italian. I do not think that ought to be considered against anybody in this case. There is no evidence as to who wrote it, nor how it came into the captain's possession, nor even that he could read it.

Mr. GILLIS.—That is Government's Exhibit No. 6.

The COURT.—I think that ought to be withdrawn, if you have not any other evidence as to that. [158]

Mr. GILLIS.—I have no other evidence.

The COURT.—I think that ought to be withdrawn, because there is nothing in the record to show how the captain got possession of it, nor who wrote it, nor that the captain was able to read the paper himself. I do not think it would be

proper to charge him, or anybody, with the contents of that paper.

Mr. GILLIS.—That is Government's Exhibit 6.

The COURT.—I think that should be withdrawn. I do not remember the exhibit number, but it is the letter that is in Italian, the unsigned letter, and the translation of it.

The COURT.—They will understand that. I do not think it is necessary to repeat that every time; but the jury will understand that that letter—you will recall that was a letter that was in Italian, unsigned, and found on the boat, or in the captain's possession—the Government has offered no evidence whatever as to its authority, how the captain came in possession of it, or that the captain could read it, or knew its contents, and, therefore, the Court is of the opinion that neither he nor anybody else connected with the affair ought to be charged in this case with the contents of that letter.

Mr. GILLIS.—That applies also to the original letter and the translation, the original letter being Exhibit 5, which will be withdrawn, and the translation Exhibit 6; they will be withdrawn.

The COURT.—Yes. [159]

MOTION TO DISMISS AND FOR A DIRECTED VERDICT.

Thereupon counsel for the respective defendants made a motion to dismiss and for a directed verdict which the Court denied with a right to renew

the same at the close of the case, to which an exception was duly and regularly taken.

Thereafter counsel renewed the various motions to strike out portions of the testimony as follows:

The COURT.—Counsel may proceed with this case.

Mr. TULLY.—Before proceeding to offer any testimony, your Honor, I desire to make a formal motion to strike out the various statements heretofore presented by the Government, upon the ground that they are immaterial, irrelevant and incompetent, and introduced prior to the proof of any conspiracy; there is no sufficient evidence to establish a conspiracy to warrant the introduction of any of these.

The COURT.—That applies to all of the statements?

Mr. TULLY.—All of the statements. With reference to the statements heretofore introduced by the testimony of Mr. Oftedal, I desire to make the additional objection as to that one, that it does not appear that it was free and voluntary, but, on the contrary, it was obtained by promise of immunity.

The COURT.—The objection will be overruled.

Mr. TULLY.—Note an exception. [160]

TESTIMONY OF JOSEPH LIPPE, CALLED FOR THE DEFENDANT CAMPINELLI.

I am a detective-sergeant and am acquainted with a Government agent named Creighton, and also with a Government agent named Campinoli. I know the defendant Campinelli. I arrested him on or

(Testimony of Joseph Lippe.)

about the month of February, 1925, at the direction of the Government Agent Campinole, who pointed him out to me. I had orders from the Captain of Detectives, Matheson, to go with Campanole and arrest anyone who he pointed out to me. Mr. Campanole pointed out to me the defendant Campinelli and I placed him under arrest. We took him over to the Hall of Justice and booked him "En route to the U. S. Marshal." I didn't know of any State charge against Campinelli. I had no warrant at all for his arrest. As soon as we booked the defendant Campinelli at the Hall of Justice, Campinole rang up Mr. Creighton. I left Campanole with the defendant Campinelli at the city prison. About an hour later I returned and Creighton asked me,"How about Campinelli" and asked me whether I could let Campanelli go. I went over to the desk sergeant and made arrangements to turn Campinelli over to Mr. Creighton, which was done. The last thing Mr. Creighton said to Campinelli was, "Well, you will be over at my office about nine o'clock in the morning." We all went out of the Hall of Justice together. When we took the defendant Campinelli down to the prison we stripped him and searched him and removed from him all valuables. In the entire matter I was acting on behalf of the United States agents and not on behalf of the State Government nor on behalf of the City Government. I did not participate [161] in the conversation between Creighton and the defendant Campinelli.

(Testimony of Joseph Lippe.)

Cross-examination.

I first saw Campinole in the Hall of Justice. Mr. Creighton was not with him at that time. I didn't know Joe Campinelli, the defendant, before I arrested him. I don't know Ricardo Campinelli, Mr. Campinole told me that they were looking for Ricardo Campinelli. When I left the Hall of Justice I had a picture of Ricardo Campinelli and when Mr. Campinole pointed Joe Campinelli I hesitated to take him and did not want to take him at all at first but when he placed him under arrest my duty was to take him and go through with it. I could see from the picture that it was not the same man but we thought probably it was and I didn't know which was Joe. Mr. Creighton was called out of bed between 12 and one o'clock at night to come down and identify him. He was turned loose about an hour later.

Redirect.

I have the picture that was given to me by the Government agent to identify Campinelli. Campinole, the United States agent, seized Campinelli, the defendant, first. When he asked Campinelli what his name was Campinelli said "Joe Campinelli." We found Campinelli in a sandwitch shop on Broadway and Columbus Avenue, about 12:30 at night. When Campinole, the United States agent seized Campinelli and told him he was under arrest Campinelli said to him, "I am under bond now; what do you want me for?" and Campinole replied, "Never mind about that, you will find out

(Testimony of Joseph Lippe.)

later." When he was booked at the city prison he gave his right name "Joe Campinelli." The name "Ricardo [162] Campinelli" was mentioned to me before I started out. It was not mentioned in the presence of Joe Campinelli. [163]

TESTIMONY OF H. S. CREIGHTON, RECALLED AS A WITNESS FOR THE DEFENDANT GUISEPPI CAMPINELLI.

I took other papers from Captain O'Hagan in addition to those heretofore offered in evidence:

Q. I show you this document, Mr. Creighton, and ask you if this is one of the papers or documents that you took from the Captain, or that were given to you by the Captain? A. Yes, it is.

Mr. TULLY.—We desire, your Honor, at this time to offer this instrument; it purports to be a certified copy of original bill of sale transferring the ship "Giulia," or certifying that the ship "Giulia" is the property of Guyvan McMillan. It bears the seal of the Panama Consul at Los Angeles, California.

Mr. GILLIS.—We, of course, may it please the Court, have no objection to the introduction of this paper but we do object to it being characterized as a certified copy of a bill of sale.

Mr. TULLY.—I am merely accepting the seal as it appears.

The COURT.—It shows on its face. . . . .

Q. I show you another instrument, and ask you

(Testimony of H. S. Creighton.)

whether you took that from the captain, or whether it was given to you by the captain?

A. That is one of the papers given to me by the captain on the 25th of October.

Mr. TULLY.—We desire to offer this document, your Honor, it is the original bill of health; it purports to show the ownership of the Panamanian ship "Giulia" by J. McMillan; it bears the date on the face of it, "July 7, 1924."

The document was marked Defendant's Exhibit "G") [164]

TESTIMONY OF G. BRACINI, CALLED FOR DEFENDANT CAMPANELLI.

G. BRACINI, a witness called on behalf of the defendant Campanelli being duly sworn, testified as follows:

Mr. TULLY.—Q. Here is an additional document which Mr. Gillis just handed me, taken from the captain, and still in the possession of Mr. Creighton.

Q. Mr. Bracini, what is your business?

A. Salesman.

Q. Who are you working for now?

A. De Martini Motor Truck Co.

Q. Are you acquainted with Mr. Campanelli, the Government agent? A. Yes.

Q. Are you acquainted with the defendant in this case, Mr. Campanelli, who sits here?

A. I beg your pardon.

(Testimony of G. Bracini.)

Q. Are you acquainted with Mr. Campanelli, the defendant who sits here in this case? A. Yes.

Q. Are you the Guido Bracini who was present during an interview between Mr. Oftedal and Mr. Campanelli? A. Yes.

Q. On or about the 5th of November, 1924?

A. I can't establish the date.

Q. You can't establish the date? A. No.

Q. But that is approximately correct, so far as the date is concerned? A. I believe so.

Q. Had you met Mr. Oftedal prior to that time, Mr. Bracini? A. Oh, yes.

Q. How long before?

A. On different occasions.

Q. Well, how long a time before November 5, 1924? A. It is pretty hard for me to say.

Q. One year, two years, three years?

A. Oh, no, probably a month or fifteen days.

Q. Fifteen days or a month before you had seen him, you mean? A. Yes.

Q. But how long have you known him altogether?

A. About two and [165] a half years.

Q. About two and a half years? A. Yes.

Q. You place the time of seeing him before this time about 15 days or a month, do you?

A. I would not absolutely say any dates. I had seen him before that time when I went there with Mr. Campanelli.

Q. Let me ask you this, Mr. Bracini, did you ever aid or assist Mr. Oftedal, or do any work for him?

(Testimony of G. Bracini.)

Mr. GILLIS.—Just a moment. To which question I object as being immaterial and irrelevant, not the proper way to prove agency.

Mr. TULLY.—I am entitled to do it.

The COURT.—How would you prove it otherwise?

Mr. GILLIS.—You cannot prove agency by the testimony of the agent, may it please the Court. You can only prove it by the testimony of the principal.

The COURT.—I don't know about that.

Mr. TULLY.—This is a criminal trial, not a civil trial.

The COURT.—I think he can testify he was acting for Mr. Oftedal.

Mr. GILLIS.—I think, may it please the Court, there is the further objection that it calls for a conclusion, and assumes he was acting for him. The witness can state what he did.

The COURT.—He can state what his relationship with Oftedal was, if any.

Mr. TULLY.—Read the question.

(Last question repeated by the reporter.)

A. Yes, I assisted Mr. Oftedal sometimes as an interpreter.

Q. In any other capacity?

A. I don't know exactly.

Q. Are you sure that that is all? I am just trying to find out.

A. Once I went on an investigation, about two years, or two years and a half ago. [166]

(Testimony of G. Bracini.)

Q. Have you done any work for him recently?

A. No.

Q. Were you paid for your work that you did two and a half years ago?

A. I had a small fee, and expenses compensation.

Q You did see Mr. Oftedal 15 days or 30 days prior to the time of this statement?

A. In all probability, yes, I did.

Q. That is as near as you can place it?

A. That is as near as I can remember it.

Q. I suppose you received compensation when you acted as interpreter, did you not? A. No.

Q. No compensation at all?

A. No compensation.

Q. You were just doing it for friendship?

A. Friendship generally between the defendants and the Intelligence Unit office.

Q. Getting back to this particular interview, Mr. Bracini, let me ask you this question: Did Mr. Oftedal ask you to go out and see if you could find Mr. Campanelli, that he was a fugitive from justice? A. No.

Q. He did not? A. No.

Q. He did not ask you anything of that sort?

A. No.

Q. He did not ask you to go out and get Campanelli at all?

A. No, Mr. Campanelli came to my house.

Q. Mr. Campanelli came to your house?

A. Yes.

Q. You reside here in San Francisco?

(Testimony of G. Bracini.)

A. Yes.

Q. Did Mr. Oftedal ever tell you, or tell you prior to November 5, 1924, that Mr. Campanelli was a fugitive from justice?

Mr. GILLIS.—Just a moment, may it please your Honor, if this is for the purpose of impeachment, I ask the time, place and parties present.

Mr. TULLY.—I have already fixed the time and place.

Mr. GILLIS.—No; you said, "Did you ever"; I want the time, place, and persons present.

Mr. TULLY.—I said prior to November 5.

Mr. GILLI.—That is not fixing the time. [167]

The COURT.—This is not impeachment, because there was no foundation laid for impeachment; it could not be for impeachment, because you cannot impeach a witness without first laying the foundation, and there was no foundation laid for that, but if this man was acting under Oftedal's authority, or direction, I think the jury is entitled to know what it was.

Mr. TULLY.—That is what I am trying to find out.

Mr. GILLIS.—I wish your Honor to bear in mind the statement of Mr. Oftedal that he was not.

The COURT.—I know. Oftedal testified about that, but that is not conclusive. Some other witness might testify differently, for all I know. If Oftedal sent this man out, or was in communication with him for the purpose of getting Campanelli and have him come to his office, or anything of that

(Testimony of G. Bracini.)

kind, the jury are entitled to know it, in order that they may weigh intelligently the statements that Campanelli made.

A. I think I heard in his office, I don't remember exactly, but I knew that Campanelli was a fugitive from justice.

Mr. TULLY.—Q. You knew he was? A. Yes.

Q. And you say prior to November 5 he came to your house in this city?

A. This is Campanelli, you mean?

Q. Yes, Campanelli.

A. Yes, he came to my house.

Q. Did you take him to the office of Mr. Oftedal? Did you go with him to the office?

A. Yes, I went with Mr. Campanelli to the office of Mr. Oftedal.

Q. Did you take him up there?

A. Yes, first I went alone to Mr. Oftedal.

Q. First you went to Mr. Oftedal's office alone?

A. Yes.

Q. Then you came back and got Mr. Campanelli?

A. Yes.

Q. Well, now, when you brought or when Mr. Campanelli came into Mr. Oftedal's office, who did he see first? A. Mr. Oftedal. [168]

Q. You saw Mr. Oftedal? A. Yes.

Q. What did Mr. Oftedal say?

A. He was joking with him.

Q. Just joking with him? A. Yes.

Q. Coming down to this statement, what was the first thing said with reference to this statement, or

(Testimony of G. Bracini.)

with reference to this alleged conspiracy which is on trial now?

A. On my first visit to Mr. Oftedal's office, Mr. Campanelli waited in the machine while I went up to Mr. Oftedal's office.

Q. You say on your first visit to Mr. Oftedal's office Campanelli was outside in the machine?

A. Yes. I went to Mr. Oftedal and I explained—

Q. (Intg.) What I want is when Mr. Campanelli was present. I am not asking you what conversation you had before that. I want to know when Mr. Campanelli went into the office there with you what conversation took place in there with reference to this statement, or with reference to this alleged conspiracy?

A. Well, he was there to say all the truth, everything he knew about the case.

Q. Did he come right in and make that statement to Mr. Oftedal, or did Mr. Oftedal ask him some questions, or what brought it out?

A. I had first arranged with Mr. Oftedal for reducing the bond of Campanelli.

Q. I see. What was the bond when you first went up to see Mr. Oftedal?

A. I heard it was $10,000.

Q. You had seen Mr. Oftedal and had the bond reduced to what?

A. To $2,500. Mr. Oftedal took it up with the District Attorney's Office.

The COURT.—You mean you had Oftedal do it.

(Testimony of G. Bracini.)

You do not mean you had it reduced to $2,500. Oftedal could not fix the bond.

Mr. TULLY.—No, I understand that, but Mr. Oftedal made an effort to have it reduced, and it was finally reduced to $2,500. [169]

A. Mr. Oftedal told me that he would take it up with the District Attorney's office.

Q. It was reduced to $2,500? A. Yes.

Q. What was the first thing that Mr. Oftedal said with reference to making this statement?

A. Well, he said, "Now, Joe, Bracini tells me you are willing to tell the truth. Are you going to tell me the truth, or are you going to tell me a long, rattling story?" And Campanelli said that he was going to tell the truth. Mr. Oftedal asked several questions, one after the other, concerning this "Giulia" case, and Oftedal said, "Joe, suppose we put it down in black and white, and you will sign the affidavit, and I will dictate it to the stenographer in your presence," so he did dictate it to the stenographer and read it over to Mr. Campanelli in my presence and the stenographer's presence, and Campanelli signed it.

Q. That was all that took place, Mr. Bracini?

A. Yes.

Q. Nothing else was said by Mr. Oftedal?

A. Nothing in the presence of Mr. Campanelli.

Q. Nothing in the presence of Mr. Campanelli?

A. No.

Q. Mr. Bracini, did Mr. Oftedal say anything

(Testimony of G. Bracini.)

to Mr. Campanelli that anything he might say might be used against him? A. Oh, yes.

Q. When did he say that?

A. I think before he asked any questions or answered the first time, that was the verbal conversation, but the second time before he took it down.

Q. Before it was taken down? A. Yes.

Q. Did he put that in the statement, do you know? A. I don't remember.

Q. You don't remember? A. No.

Q. Do you know what he said in that regard?

A. Yes, he said that he understood, Campanelli was to understand that any statement he did make might be used against him, the statement given might be used against him. [170]

Q. Did he say anything to Mr. Campanelli about what he would do for him? A. Not a word.

Q. Did he say anything to you?

A. When I went there to Mr. Oftedal alone he told me—I explained to Mr. Oftedal my view, I felt that Campanelli was a minor offender against the law, and I knew Campanelli did not have the brains, and did not have the finances to organize any crime of that nature.

Mr. GILLIS.—I think, may it please the Court, that what this man thinks is immaterial.

The COURT.—Just state what was said.

Mr. GILLIS.—The conversation that transpired between Mr. Oftedal and this man.

(Testimony of G. Bracini.)

Mr. TULLY.—State what you said to Mr. Oftedal, and what he said to you.

Mr. GILLIS.—This is outside of the presence of the defendant.

The COURT.—I know, but this man was acting under Oftedal's instructions.

Mr. GILLIS.—He has not so testified.

Mr. TULLY.—Mr. Oftedal so testified yesterday afternoon.

Mr. GILLIS.—On the contrary, he said just the opposite.

Mr. TULLY.—Q. What did Mr. Oftedal say to

The COURT.—By Oftedal's consent, whether there were instructions, or not.

Mr. TULLY.—Q. What did Mr. Oftedal say to you, and what did you say to Mr. Oftedal?

A. Mr. Oftedal agreed that he thought himself that Campanelli did not have the brains or finances to do anything like that, and told me that the Government looked favorably upon any minor defendant who would come and tell the whole truth, that generally in a case like that, where these minor [171] defendants are of great help to the Government, generally the District Attorney's office is informed of the case, and the case is presented to the presiding Judge, but in any case the Judge is the one that has the final decision.

Q. Did he state to you, or did you state to him, what punishment might be imposed?

A. No, not at that time.

Q. Not at that time? A. No.

(Testimony of G. Bracini.)

Q. Now, after your discussion with Mr. Oftedal, you took the matter up with the defendant Campanelli, did you not? You talked to Mr. Campanelli? A. Oh, yes, ondifferent occasions.

Q. Did you tell him about your interview with Mr. Oftedal? A. Yes.

Q. Then after that you brought Mr. Campanelli up? A. Yes.

Q. Now, did Mr. Oftedal, after this statement of November 5, or whatever date it was, 1924, was signed—did Mr. Oftedal ask you to find Mr. Campanelli again, to bring him in to his office, or anything to that effect?

A. Yes, Mr. Oftedal called me up on the phone and said they were looking for Campanelli, and they could not locate him, and asked me if I could locate him for him.

Q. Did you locate him for Mr. Oftedal?

A. Yes, I did.

Q. Where did you find Mr. Campanelli at that time? A. I think it was at North Beach.

Q. On what street, if you remember?

A. Generally he hangs around Broadway and Columbus Avenue.

Q. Broadway, near Columbus Avenue?

A. That is generally where I located him.

Q. Can you fix approximately that date?

A. No.

Q. You cannot fix approximately that date?

A. No.

Q. You went up and got Mr. Campanelli?

(Testimony of G. Bracini.)

A. Yes.

Q. What did you tell him, when you saw him that time?

A. I told him Mr. Oftedal would like to see him. [172]

Q. What did Mr. Campanelli say?

A. All right.

Q. He willingly went down to the office with you? A. Yes.

Q. Did Mr. Oftedal tell you before he telephoned you to get Mr. Campanelli what he wanted Mr. Campanelli for? A. No.

Q. He did not mention that at all?

A. No, not when he spoke to me through the telephone.

Q. Did you come in with Mr. Campanelli that time? A. Yes.

Q. When you got into Mr. Oftedal's office, what took place?

A. Mr. Oftedal said, "Now, Joe, you have not told me all the truth, I know you are holding something back, I know"—he said, "We have facts, we know a lot of things that you think we don't know. Now, are you willing to say the truth, or not?" That is all, more or less, that was said. At that Joe answered, "Of course, I am here to say the truth."

Q. Did they have another conversation covering the alleged conspiracy here, or the previous statement made? A. Not that I remember.

Q. They held no conversation there at all?

(Testimony of G. Bracini.)

A. No.

Q. Did Mr. Oftedal prepare another statement, or have prepared another statement there for Mr. Campanelli to sign it?

A. No, there was nothing prepared there.

Q. There was no statement prepared? A. No.

Q. There was not any drawn up at all?

A. No.

Q. Did he give you a copy of any statement to take to the attorney's office, Mr. Campanelli?

A. He gave it to Campanelli.

Q. He gave it to Campanelli? A. Yes.

Q. Now, was that statement drawn up there then?

A. While we were waiting, yes.

Q. While you were waiting?

A. Yes. I was not in the room, with Mr. Oftedal or Mr. Campanelli, I was in the next room. [173]

The COURT.—How many times were you at Oftedal's office with Campanelli?

A. I will say that I have been there two or three times.

The COURT.—My recollection is that Mr. Oftedal testified three times.

Mr. TULLY.—Once in this building, however, your Honor; twice at his office.

The COURT.—Was it at the second visit that Oftedal testified that a copy of the statement was given to the defendant?

Mr. TULLY.—The second visit to Mr. Oftedal's office.

The COURT.—To Oftedal's office.

(Testimony of G. Bracini.)

Mr. TULLY.—Yes.

Q. Were you present, Mr. Bracini, when any part of that statement was drawn up, or were you in another room?

A. I was present, I think, at the beginning.

Q. You mean at the beginning of the questioning, or at the beginning of the preparation of the paper?

A. At the beginning of the preparation of the questioning, and it seems that Campanelli had some secrets that he wanted to give out, and I suggested that I did not want to know his secrets.

Q. And you walked out? A. I walked out.

Q. Did you receive the statement after it was prepared? A. No.

Q. You did not? A. No.

Q. Mr. Oftedal did not read it to you?

A. I am wrong about that, I think he did read the statement to me, in Mr. Campanelli's presence. Campanelli had refused to sign it.

Q. What did he say about signing it?

A. Mr. Campanelli said that his attorney had advised him not to sign anything, and until that time I did not know he had an attorney, and I asked his name, and he said, "Tully." [174]

Q. That was the first time you ever knew he had an attorney?

A. That was the first time I ever knew he had an attorney.

Q. What was said by Mr. Oftedal, if anything, to Mr. Campanelli, or by you to Mr. Oftedal, or by Mr. Oftedal to you with reference to aiding and

(Testimony of G. Bracini.)

assisting Mr. Campanelli if he would execute that statement? A. There never was any agreement.

Q. I do not mean any executed agreement, I mean what was said or done with reference to that matter?

A. I do not understand your question.

Q. All right: Did you say anything to Mr. Oftedal there?

A. I always pleaded for leniency toward Campanelli.

Q. What did you say to Mr. Oftedal, that is what I mean, what I am trying to get at. What did you say to Mr. Oftedal?

A. I always said that in my opinion Campanelli was not as guilty as other people in this transaction here, that he was an uneducated fellow, that he was very honest, that I have known him for years, and he had been struggling for every nickel in an honest way, and if he was involved in anything, I was convinced he was not as guilty as other people involved in the transaction.

Q. What did Mr. Oftedal say that he would do, if anything?

A. He agreed with me that Campanelli was not, or did not have the brains or finances to be the originator of such a conspiracy.

Q. What was said, if anything, with reference to making recommendation as to punishment, or as to what would happen to Mr. Campanelli?

A. Mr. Oftedal always said that the Judge, the presiding Judge, would finally decide anything

(Testimony of G. Bracini.)

about a defendant, but he also said that the Government was always lenient towards the defendants, the minor defendant, that came and made a clean breast of it.

Q. Now, did you say anything to Mr. Oftedal in that regard, as [175] to punishment?

A. You mean at the last visit I had at the office with Mr. Oftedal?

Q. Yes. A. Yes.

Q. What did you say?

A. I said to Mr. Oftedal, "Now, does this case look real bad?" And he did not answer anything, and I said, "Now, this fellow, what shall I do with him? Do you want him to plead guilty, or has he got any line of defense?" Oftedal said he might plead guilty and he might refer the matter to the District Attorney and the District Attorney might turn it over to the presiding Judge, or arrange leniency in his case, and then I suggested in that case probably, I said, he would come out with a fine, a nominal sum of money, probably $300, and Oftedal said nothing; I thought that was the silent understanding.

Q. You conveyed that information, did you, Mr. Bracini, to Mr. Campanelli?

A. On my own initiative I said to Campanelli, "The best thing you can do is to plead guilty."

The COURT.—Was that before or after he made the statement? A. After he made the statement.

Mr. TULLY.—Q. Had he signed the statement up till that time?

(Testimony of G. Bracini.)

A. No, he refused, on the ground that his attorney advised him not to sign anything.

Q. Now, before you left the office, did Mr. Oftedal say anything to you? A. Not a word.

Q. Did he direct you to go with Mr. Campanelli to the attorney's office?

A. Yes, he said, "Bring this to the attorney's office."

Q. Did you go to the attorney's office?

A. Yes.

Q. You came in with Mr. Campanelli?

A. Yes.

Q. Now, I will ask you on that particular occasion if you did not state— [176]

Mr. GILLIS.—Just a moment. He is cross-examining his own witness.

The COURT.—He can state what he said.

Mr. TULLY.—I am asking whether he said this.

The COURT.—Of course, he is your own witness.

Mr. TULLY.—I understand, but this fellow is a little hostile, I had to subpoena him.

The COURT.—He has not shown any hostility so far.

Mr. TULLY.—Q. Mr. Bracini, I will ask you whether after coming to my office, in the presence of Mr. Campanelli, you did not state—

Mr. GILLIS.—Just a moment, may it please the Court; this is his witness. Ask him what he said.

The COURT.—Yes.

Mr. TULLY.—Q. What did you state with reference to what would be done for Mr. Campanelli?

(Testimony of G. Bracini.)

A. I said in all probability if he pleaded guilty he would come out with a fine, a nominal sum of money, probably $300, in my opinion.

Q. What did you say, if anything, with reference to having him sign that statement?

A. I never suggested that he sign the statement.

Q. Did you deliver a copy of that statement to me?

A. I said I never suggested to him to sign anything.

Q. Mr. Bracini, if you came to my office after discussing this matter with Mr. Oftedal, concerning the signing of this statement, and you did not come there to discuss the statement, what did you come there to discuss?

Mr. GILLIS.—I think that is immaterial. Let him state what he did, and what was said.

Mr. TULLY.—What was said with reference to this statement in my office?

A. You said that you would not consider it anything at all, and you would not leave any defendant to the mercy [177] of the Government.

Q. I will ask you whether this was not what was said—

Mr. GILLIS.—I object to that.

Mr. TULLY.—He is a hostile witness, and—

Mr. GILLIS.—It has not appeared yet.

The COURT.—He has not shown the slightest intimation of it.

Mr. TULLY.—Q. Was anything said with refer-

(Testimony of G. Bracini.)

ence to calling Mr. Campanelli as a witness in my office? A. Yes, I said it.

Q. You said it? A. Yes.

Q. Was anything said about subpoenaing him?

A. Yes, you said, "Why don't they subpoena him?"

Q. Was he subpoenaed? A. I don't know.

Q. You don't know? A. No.

The COURT.—By the Government?

Mr. TULLY.—Yes.

The COURT.—The Government would not subpoena a defendant whom they had under indictment, I hope.

Mr. GILLIS.—We have not gone that far yet.

Mr. TULLY.—Q. But this was all before the trial? A. Yes.

Q. Did you convey the information back to Mr. Oftedal? A. No.

Q. You did not say a word to him about it?

A. I have not seen Mr. Oftedal, I presume, for probably 20 or 25 days after I was in his office.

Q. You did not report back to him anything that took place there? A. No.

Q. When was the last time you saw Mr. Oftedal?

A. I saw him yesterday, fifteen minutes to two.

Q. Did you see him last evening?

A. Last evening I was in his house.

Q. You were out at his house? A. Yes. [178]

Mr. TULLY.—That is all.

(Testimony of G. Bracini.)

Cross-examination.

Mr. GILLIS.—Q. Mr. Bracini, how long have you known Mr. Campanelli?

A. At least ten years.

Q. At least ten years? A. Yes.

Q. You are a very good friend of his, aren't you?

A. Yes, I am a very good friend of his.

Q. And up to that time you had been a very good, close friend of his? A. Yes.

Q. And when this action was brought and the complaint was filed, his bond was fixed at $10,000, was it not? A. So I heard.

Q. And Mr. Campanelli came to your house and talked about it?

A. It was half-past eleven that he was in the house, and he said he had no finances, he had no money, and he could not afford possibly to put up $10,000 bond.

Q. Did he say he knew he would be caught?

A. That is exactly what he told me.

Q. If he could get his bond reduced to $2500 he would like to do it? A. That is it exactly.

Q. He came to you as his friend to see?

A. There was no specific agreement about $2,500, he said if I could only have my bond reduced.

Q. To some amount that he could put up?

A. Yes. I asked Campanelli how much bond he could afford to put up, and he said, "Probably $2,000 or $2,500."

Q. And he came to you as a friend to get you to help him to get his bond reduced? A. Yes.

(Testimony of G. Bracini.)

Q. And that was the reason why you first went to Mr. Oftedal's office?

A. The only reason I went to Mr. Oftedal's office, to have the bond reduced. [179]

Q. On the solicitation of Mr. Campanelli?

A. On the solicitation of Mr. Campanelli, yes.

Q. When you went to Mr. Oftedal and got to discussing these statements, didn't Mr. Oftedal always tell you—

Mr. TULLY.—Ask him what was said.

Mr. GILLIS.—This is cross-examination.

Mr. TULLY.—All right.

Mr. GILLIS.—Q. Didn't Mr. Oftedal always say that he would not promise Campanelli anything?

A. He always said that he could not promise anything, he had no authority to promise anything.

Q. He had no authority to promise anything, at all? A. No.

Q. That if Campanelli wanted to make a statement and tell what he knew, that he would like to have him tell the truth and get the facts?

A. Yes.

Q. That was always said to Campanelli every time he came to the office, was it not? A. Yes.

Q. Now, so far as being hired by Mr. Oftedal, Mr. Oftedal didn't hire you, did he? A. No.

Q. You did not get any money for it? A. No.

Q. He did not employ you in any way?

A. No.

Q. You did not tell him you were an agent of the Intelligence Unit, or from his office? A. No.

(Testimony of G. Bracini.)

Q. As a matter of fact, all the services that you rendered in the transaction that happened between Mr. Oftedal and Mr. Campanelli were done out of friendship for Mr. Campanelli? A. Yes.

Q. And it was to help Mr. Campanelli out?

A. Yes.

Q. When you went over to Mr. Tully's office and suggested that there might be a fine of $300, you thought at that time that Campanelli was guilty, didn't you? A. Well, yes, in a minor way.

Q. From the statements he had made?

A. In a minor way, that is the reason I went to the front for him. [180]

Q. You figured, in your own mind, that the best way for Campanelli to do would be to plead guilty and throw himself on the mercy of the Court?

Mr. TULLY.—We object to what was in his own mind. Let him state what was said.

Mr. GILLIS.—I am cross-examining your witness. I have a right to ask it.

The COURT.—Go ahead.

Mr. GILLIS.—Q. That is the reason why you made the statement?

A. I always felt that Martinelli was the tool, was the tissue in the hands of the big fellows.

Q. And you suggested in Mr. Tully's office to Mr. Martinelli that if he pleaded guilty he would probably get off with a light fine?

A. I said he probably would get out with a light fine, they would probably recommend to the District

(Testimony of G. Bracini.)

Attorney's office, clemency to the presiding Judge, and he probably would get out with a fine of $300.

Q. That is the reason why you said that?

A. That is the reason why I said that.

Q. Mr. Oftedal did not tell you to say that?

A. Absolutely not.

Q. Mr. Oftedal always told you he had no authority?

A. No authority; he always told me no authority, everything rests upon the Court.

Q. Mr. Bracini, as a matter of fact you had talked to Mr. Campanelli prior to going to Mr. Oftedal's office with reference to the time when McMillan was inducing Campanelli to go into this "Giulia" scheme, hadn't you? A. Yes.

Q. And, as a matter of fact, in those conversations with Campanelli you tried to keep Campanelli from going in with McMillan, didn't you?

A. Yes, I said to him once, I told him he had better keep away from these people. [181]

Q. At that time, in your conversation with Campanelli, Campanelli told you that McMillan was trying to get at him.

Mr. TULLY.—I object to that as immaterial, irrelevant and incompetent, and not proper cross-examination.

Mr. GILLIS.—It shows his connection.

The COURT.—I hardly think it is cross-examination.

Mr. TULLY.—Absolutely not.

(Testimony of G. Bracini.)

Mr. GILLIS.—To ask him if he made any statements of that kind.

Mr. TULLY.—I object to it, and assign it as misconduct, and ask that the jury be instructed to disregard it.

The COURT.—I will not give the admonition.

Mr. TULLY.—Exception.

Mr. GILLIS.—I will ask you this, Mr. Bracini: During the times that you were with Mr. Campanelli, when you went to Mr. Oftedal's office, did you have any conversation with Mr. Campanelli along the lines that you had previously warned him not to go into this scheme?

Mr. TULLY.—The same objection.

The COURT.—I think it is competent.

Mr. TULLY.—Exception.

A. Yes.

Q. You told him in those conversations, as you had at this last time, didn't you tell Mr. Campanelli that you said to him, "Didn't I warn you not to go in with McMillan and that crowd?"

A. Yes.

Q. And you told him that if he went in with them he would get into trouble? A. Yes.

Q. And you told him "You had better keep away from them"? A. Yes.

Mr. GILLIS.—That is all.

Redirect Examination. [182]

Mr. TULLY.—Q. Mr. Bracini, do you know Mr. McMillan? A. I saw him once or twice.

Q. Did you ever meet him?

(Testimony of G. Bracini.)

A. I think I met him once, I used to go to a fellow that got a tailor shop right at 17 Columbus Avenue, that is where Campanelli and these other people I don't know were occupying an office.

Q. Is that Guyvan McMillan, that you are speaking of now?

A. No, I am talking about a certain McMillan that seems to be implicated in this "Giulia."

Q. I am speaking now about Guyvan McMillan I want to know whether you know that man?

A. I know one fellow by the name of McMillan that used to stay there at 17 Columbus Avenue.

Q. You don't know whether it was Guyvan McMillan, or who it was?

A. I don't know his first name. I know that his name was McMillan.

Q. I understood you to say that at the time of the second interview, in Mr. Oftedal's office, that Mr. Campanelli had some secrets that he wanted to convey to Mr. Oftedal when you were not present, and you left the room. A. Yes.

Q. You knew nothing about what those secrets were? A. No.

Mr. TULLY.—I think that is all.

Recross-examination.

Mr. GILLIS.—Q. Did you know that the McMillan you knew was the man that was mixed up in the "Giulia" matter? A. Yes.

Mr. GILLIS.—That is all.

Mr. TULLY.—The defendant Campanelli rests,

(Testimony of John O'Hagan.)

your Honor, with the exception that if after the examination of these instruments I desire to recall Mr. Creighton I will reserve that.

The COURT.—Very well. [183]

TESTIMONY OF JOHN O'HAGAN, ONE OF THE DEFENDANTS.

JOHN O'HAGAN, a witness on his own behalf, being duly sworn, testified as follows:

I am thirty-four years old and reside in Liverpool, England. I have been a ship master since 1920 and been following the sea for an occupation since I was 16 years of age. Before April, 1924, I was working for the Associated Oil Company. I left San Pedro and came to San Francisco. I passed by the British Consulate and asked if there were any British ships in port that required a master, and was referred by the Consul to Mr. McMillan who recently purchased a ship. I went to the address given by him at 17 Columbus Avenue and there met Mr. McMillan. Mr. McMillan informed me that he intended to send a cargo of canned gods from San Francisco to Havana, Cuba, and that his ship was in the Los Angeles Drydock, and asked me to go down and inspect the vessel. On April 29th I left San Francisco and went to Los Angeles. McMillan arrived ten or eleven days afterwards. Repairs were then being made on the vessel. He told me it was not necessary for me to engage a crew, that he had already engaged a crew in

(Testimony of John O'Hagan.)

San Francisco. He arrived in Los Angeles with the crew. The ship was called the "Giulia." I left Los Angeles harbor on May 24th in the vessel. I proceeded to Panama City for the purpose of procuring a provisional Panamanian registry at that time. It would have taken several months to procure the British registry of the ship and for that reason it was registered under the Panamanian flag with Guyvan McMillan appearing as owner. The document offered into evidence is the registration of the ship "Giulia" under the Panamanian flag. I left Panama and proceeded to Havana, Cuba, and was advised there for the first time that a cargo of liquor was to be loaded on the vessel. My copy of the bill of lading as to the contents of the [184] cargo has already been offered as evidence. I insisted that the following clause be placed in the bill of lading: "Consignees will have option, weather permitting to take delivery on the high seas, but in no case and under no circumstances is delivery to be made within 20 miles of any territory, and then only on the Pacific Coast within a radius of a line drawn due west of San Diego and a line due west of Seattle, always at least 25 miles from such described coasts or territories. All island territories within this described area to be taken as the measurement point for such deliveries, if made, in order to conform with a recent treaty made between Great Britain and the United States of America. Also, should

(Testimony of John O'Hagan.)

the maximum speed of any vessel taking delivery be more than 15 knots per hour, such excess speed must be added to the delivery distance from the within described area." I had the clause inserted in the bill of lading for my own protection and I did not desire to violate the laws of the United States. I believed I was entitled to deliver the cargo outside the three mile limit, but to protect myself I insisted on this clause being put in and the distance extended to 20 miles off shore. I sailed from Havana, Cuba, with Vancouver, B. C., as my destination, but I received instructions from my supercargo, who was on board the vessel. I was instructed in Havana that he would give me definite instructions at Mazatlan as to any point or position where I was to deliver cargo. If the supercargo had ordered me to deliver cargo within the territorial waters of the United States I would have disregarded his orders. I lived up to the clause in my manifest to the letter. I had to call at Mazatlan for coal. While there a fire broke out and damaged the vessel. After leaving Mazatlan I had bad weather all the way up until I arrived at a position which was given me by the purser at Mazatlan, which to the best of my recollection was about 30 miles west of Halfmoon Bay. By this time my coal was [185] exhausted, my food running short, and I was compelled to run back under sail to Ensenada. On the way down I hailed a small boat and asked them to send a

(Testimony of John O'Hagan.)

cablegram for me to 17 Columbus Avenue, addressed to Mr. McMillan, because Mr. McMillan was the only man I recognized as owner of the ship and his name appeared upon all the documents in my possession as owner of the ship. The cable was sent from Ensenada by the purser and eventually Mr. Campanelli arrived in Ensenada in company with his brother or cousin. Negotiations were entered into by someone and I received from the steamer "Gryme" about 700 sacks of coal, which was just sufficient to bring me back to the Farallones. When I arrived at my new position no boat was there, but eventually I received 30 or 40 sacks of coal. I made delivery of cargo on the high seas to two boats, but I can't remember especially the occasions. The first boat that came alongside delivered coal. I do not recall whether it took off any liquor. The supercargo or purser deserted the boat as soon as the coal was delivered and returned on the boat that brought out the coal. I received some coal from a boat in the vicinity of Pt. Reyes. I met that boat about 25 or possibly 30 miles west of the Farallones. It was sent out to give me coal. The weather was too rough to load the coal on the "Giulia" in that position and after consultation with the captain of the "Shark" it was decided we should go inside Pt. Reyes. My boat was absolutely out of fuel by the time the "Shark" arrived and could not have proceeded any distance in that condition. I had only

(Testimony of John O'Hagan.)

enough coal for a couple hours steaming and only about 130 or 140 pounds of steam in the boilers. Had I not received the coal from the "Shark" my boat and all of us would have been in great jeopardy. I could take on at that point only a few sacks of coal, sufficient to steam into Pt. Reyes. An effort was made to coal at sea, but it was so rough that the bulwarks of my ship and the bulwarks of the "Shark" were getting [186] smashed in so badly that we decided to steam under the lee of Pt. Reyes. It was absolutely necessary to go into Pt. Reyes in my belief. According to maritime law or international law, so far as I know, I was entitled to go into that cove and coal under those circumstances. The "Shark" did not take any cargo off my boat. I would not have permitted it. The captain of the "Shark" requested a few cases for his own consumption, but I would not permit the delivery of it. After the "Shark" left I proceeded to my position again 25 or 30 miles west of the Farallones. The fuel received would last me between 26 and 27 days. That was the last coal I received. I received some water from the "Shark." I received a small quantity of provisions about 25 or 26 days before I abandoned the ship.

On October 24, 1924, I abandoned the ship. At that time my coal was absolutely gone. I think it was about six weeks after I had received the coal from the "Shark." We did not have

(Testimony of John O'Hagan.)

enough provisions on board to last for 20 minutes; we were absolutely starved and hungry. We had been without provisions for four or five days. The water on the ship was muddy and dirty and I was at the bottom of my tank and everybody was sick and complained. Nobody had had a wash for 17 days on board the vessel. We were so afraid of the water that we would not use for washing. We had no doctor or physician on board. My condition was very bad and I had been drinking champagne instead of water and I was in a very nervous condition. The crew wanted me to abandon the ship 10 or 12 days before I actually did, on account of the shortage of provisions and water, but I prevailed upon them to stay until conditions got so bad that I finally consented and we abandoned the ship. I abandoned the ship about 19 miles west of Pt. Estreros. My crew got into life-boats, the first engineer and myself went down to the engine-room and opened the seacocks and he came on deck and went into a [187] life-boat. I went around the ship to make sure that the vessel would not float and remained aboard about half an hour. I sunk the vessel because I did not want to leave a floating derelict on the ocean and thus create a menace to navigation or to other property afloat. The vessel actually sunk. Four or five hours afterwards we were picked up by the steamer "Brookings" and came into San Francisco on it. When we arrived in San Fran-

(Testimony of John O'Hagan.)

cisco at the quarantine station we were surrounded by a bunch of immigration officials and custom agents and I handed my papers to Mr. Creighton. I first saw Mr. Creighton on the "Brookings." He was the first Government official I met. Mr. Enlow picked up my papers and with Mr. Creighton took me into the pilot-house where they began to question me. Mr. Enlow said "Captain, you are in a pretty bad jam. We know a whole lot more about this business than you think and you had better tell us all that you know." Mr. Creighton told me he was prepared to help me out. He said he didn't want to jam us as we had enough of our own trouble; he was not after us but he was after the big fry. He asked me at that time whether this ship belonged to DeMaria. Until the beginning of this trial I had no idea of the identity of Mr. DeMaria. Mr. Creighton promised to assist me all he could and he told me to make a statement and tell all I knew and we will see that you people get fair play. Mr. Creighton also said I will see that you and the crew get your wages from Mr. McMillan. When I signed the statement for Mr. Creighton I was in a very bad physical condition. That is my signature on the statement, but I would hardly recognize it. The statement was signed in the custom-house in the evening. When I arrived at the custom-house I was an absolute wreck. He told me that he did not want the statement to use against me; that it was to get the higher-ups.

(Testimony of John O'Hagan.)

Mr. Creighton came over to see me later when I was at Angel Island, after the indictment was [188] returned against all the defendants in this case. Mr. Creighton was the only man I had any dealings with after I arrived in San Francisco, so I phoned to Mr. Creighton and asked him if he had apprehended Mr. McMillan, because I wanted my wages for myself and crew so that I might obtain legal assistance for myself and my crew. On that occasion Mr. Creighton recommended an attorney by the name of J. H. Morris. Mr. Morris afterwards came and interviewed me and told me that he represented one of the defendants by the name of Alioto already and that he would secure for me the same immunities he had secured for Alioto. I asked him what the immunity was and he said Alioto had his boat returned to him. Mr. Morris asked me to come into court and plead guilty. Up until this day I cannot see where I am guilty of any conspiracy. At that time I could not see it. Mr. Morris appeared for me at the time of my plea and upon my suggestions Judge Partridge was informed that Mr. Morris was not in a position to represent me further in this case. I was employed by Mr. McMillan at a salary of $240. a month. I am familiar with the wages usually paid the master of a vessel of the class of the "Giulia." The wage usually paid is between $350 and $400 a month. I was actually getting less than the normal wage. I have not received

(Testimony of John O'Hagan.)

my wages due me. I drew a few dollars in each port for personal expenses. I do not suppose the total would amount to $200. Some of the crew received part payment of their wages. McMillan hired the crew with the exception of those that were engaged in Cuba. None of the crew who are defendants here were capable of navigating the ship "Giulia." As master the crew was strictly under my orders and I told them they were bound for Vancouver, British Columbia. I took them into the Panamanian Consul at Havana and there read the articles over with them and they knew we were to proceed from Havana to Vancouver. I did not see DeMaria in Los Angeles or Havana or Mazatlan. I did [189] meet DeMaria in a saloon in Ensenada. I met him in Quinlan's saloon. I did not discuss with DeMaria the matter relative to the "Giulia's" cargo or the coaling of the "Giulia." I never heard of DeMaria having any interest in the boat "Giulia" or the cargo until Mr. Creighton asked me the question.

When I returned to Ensenada, Mexico, for coal I got in touch with the purser, Joe Gerbaudo, and he negotiated for it. He informed me that all negotiations were consummated for the coal, which would be brought down by the "Gryme." Mr. Campanelli did not bring any provisions or coal. I saw Mr. Campanelli the last afternoon I was in Ensenada, eating a lot of watermelon. I arranged the registering of the "Giulia" under

(Testimony of John O'Hagan.)

the Panamanian flag through a lawyer by the name of Morales. At the time of the registration I filed the original bill of sale I carried down with me. I got a certified copy of the bill of sale. The instrument marked Defendant's Exhibit "F" was a copy I procured.

Cross-examination.

When I got off the "Brookings" the first place I landed was on the deck of the coast guard cutter. When we landed in San Francisco I walked up to the Custom-house with Mr. Creighton and had breakfast with him. That was the same day the statement was signed. I objected on several occasions during the day to cross-examination and asked Mr. Creighton to let me see a doctor because I was feeling very bad, but Mr. Creighton evaded the issue all the time and kept on detaining me. They continued to harass me and worry me so that I was in a terrible state and they kept me in the custom-house to four or four thirty in the afternoon and I signed the statement because I wanted to get rid of Mr. Creighton and Mr. Enlow harassing me all the time. I went out about one o'clock with two men, but I had no lunch. Mr. Creighton told me he was not after me or the crew at [190] all, and sympathized with us most heartily, but that he was after the higher-ups in the matter.

I first met Mr. McMillan at 17 Columbus Avenue, which is not in the British Consulate. I met Mr. Campanelli at the same address. He was in com-

(Testimony of John O'Hagan.)

pany with Mr. McMillan on the second visit. There was no formal introduction. We just started to talk. I never had a formal introduction to Campanelli. I did not meet Mr. Henderson there. I met another gentleman there—I haven't seen him from that day to this. I discussed the "Giulia" on the first occasion with Mr. McMillan solely. On the second occasion I met Mr. Campanelli and I believe I discussed the "Giulia" at that time. Mr. Campanelli did not give me the impression that he had any interest in this ship, but was merely acting under instructions from McMillan. Shortly after I went down to look at the boat Mr. Campanelli and Mr. McMillan showed up in Los Angeles and I met them there. Most of the time they were separate. Mr. Campanelli left before we sailed. McMillan remained there until the day we sailed. I did not talk to Campanelli about the register of the ship, but with Mr. McMillan. I did not discuss registering the ship under the American flag. McMillan decided what flag it was to be registered under. McMillan in Los Angeles effected all negotiations for the transfer of the flag with the Panamanian Consul there. I was called up to sign a couple of documents, that was all. McMillan secured the instrument known as Defendant's Exhibit "F" and his signature is signed on it.

When I went to Havana I saw Mr. Henderson, a man named Stevens, a man named Holmes, and Campanelli. McMillan was not there. Mr. Mc-

(Testimony of John O'Hagan.)

Millan told me I was to take instructions from Campanelli. On the first occasion I met Mr. Henderson and Mr. Henderson at that time took absolute charge of the loading of the ship. He seemed to have all the say with regard to the disposition [191] of the cargo and everything else. Campanelli informed me that Henderson was the boss. I went down to Havana with coal in my two hatches. McMillan did not tell me what kind of a cargo I was to pick up in Havana. He told me when he first engaged me that he was negotiating for a cargo of canned food for Cuba and that he probably would take sugar back.

Holmes was introduced to me and I was informed that Holmes was to be consignee of the cargo in Vancouver, B. C. I did not discuss with Holmes the delivery of the cargo. The bill of lading was drawn up in the Anglo Cuban Steamship Co. They were the agents of the consignors. The same day it was drawn up the clause with reference to the delivery on the high seas was put in. They put it in at my instruction. Before that was put in the bill of lading the manifest showed that the cargo was to be delivered at Vancouver in transit for Hongkong. Mr. Henderson was the first man to inform me of the possibility of delivery of parcels on the high seas. I told him I would not do anything which was a violation of the Prohibition Act of the United States. He discussed the matter with Mr. Holmes and Mr. Holmes told me to take my instructions regarding delivery of the cargo from

(Testimony of John O'Hagan.)

my supercargo. He directed that I be guided entirely with reference to the delivery of this liquor by Gerbaudo. I believe Campanelli was at Havana until after the ship left. At Mazatlan the supercargo gave me directions to take a position about 30 miles west of Halfmoon Bay, as I would be met there with coal, and that the boat might possibly take some of the cargo. I proceeded to the position that I was directed to and was compelled to return to Ensenada for coal. I was at Ensenada possibly three days before I saw Campanelli. I think I met Campanelli in town on the first occasion; I am not sure. I told him the situation I was in. Campanelli and my supercargo discussed the matter in Italian, which I do not understand. The supercargo [192] informed me that arrangements were made to bring coal down from San Diego. Canpanelli came back with us on the boat—back to San Francisco. The first vessel brought coal. More coal came out later. Gerbaudo left on the first boat. Campanelli also left. The same day that Gerbaudo left, Henderson came on board with his wife. He stated there about three weeks. About six or seven loads of cargo were removed from the vessel under Henderson's instructions. When we took on the coal from the "Shark" we were within the territorial waters of the United States. I had many disputes with Henderson. I told Gerbaudo that when I got the coal which was promised me in Mazatlan I was going to proceed direct to Vancouver, but Henderson came out and he was aware

(Testimony of John O'Hagan.)

I was going to Vancouver and he persuaded me to remain a day or two while he got some things. His wife came on board with him and I did not like to go to Vancouver with a lady on board, and I remained out there. After 12 or 14 days we started to drift. Henderson and his wife went back to shore before we started to drift. I advised him to take his wife off the vessel because we were in a precarious condition. I had four rifles, a quantity of revolvers, and a machine gun on board. McMillan sent them down to the vessel before we left San Pedro. They were all eventually thrown overboard. I received no money in Ensenada. The supercargo received the money. When the purser left the vessel at San Francisco there was $130 on board. I met De Maria in Quinlan's saloon in Ensenada. Campanelli was not with him. My purser was with him on that occasion.

Redirect Examination.

Of the four rifles carried on board, one was my private property, which I always carried. It is customary on sailing vessels and ships of this class engaged in the merchant marine service to carry rifles, especially since the war. There is usually [193] one rifle for every officer on a vessel. There are usually three mates and two or three engineers. When I got to Havana I took my orders from Mr. Henderson, and not from Mr. Campanelli. When I arrived in Havana Mr. Campanelli seemed to have lost all authority and Henderson was in charge. Mr. Campanelli did not direct me to load the ship.

(Testimony of John O'Hagan.)

Mr. Campanelli gave me no money in Ensenada and no orders.

Recross-examination.

I followed the direction of Mr. Henderson in Havana because Mr. Campanelli told me that he was the boss. [194]

TESTIMONY OF H. S. CREIGHTON, RECALLED IN REBUTTAL AS A WITNESS FOR THE UNITED STATES.

H. S. CREIGHTON, called on behalf of the United States, being first duly sworn, testified as follows:

I heard the testimony of Captain O'Hagan, with reference to certain promises made by me to him. I did not make any promises to him. Some time after October 25th, he telephoned to me and asked me if something could not be done whereby his case could be disposed of, instead of his being held indefinitely. He told me he didn't know anybody in San Francisco but me. He asked me if I knew a lawyer. I mentioned the name of Mr. Morris to him, and, after consulting a telephone directory, gave him Mr. Morris's telephone number.

Cross-examination.

Mr. Morris had consulted me before with reference to the release of the boat called the "Nat" which had been seized for the alleged smuggling of liquor. Mr. Morris was the attorney for the owner of the boat, Mr. Aliotos, a witness in this case. Captain

(Testimony of H. S. Creighton.)

Herman of the "Nat" stated to me that he had carried liquor into the port on the "Nat," and I know that he was never indicted, and no steps have been taken to forfeit the boat "Nat." I did not recommend Mr. Morris to Mr. Campanelli as an attorney. Mr. Morris told me at one time that he had talked with the defendant Campanelli. [195]

TESTIMONY OF J. H. MORRIS, CALLED ON BEHALF OF THE UNITED STATES.

J. H. MORRIS, a witness called on behalf of the United States being duly sworn, testified as follows:

I am an Attorney at Law and practiced in San Francisco for about 18 years. I received a telephone communication from Captain O'Hagan from Angel Island. He asked me to come and see him. In the conversation I had with him I did not tell him that I would get him the same immunities as I got for Alioto, or any words to that effect.

TESTIMONY OF J. G. KENNY, CALLED ON BEHALF OF THE UNITED STATES.

J. G. KENNY, a witness called on behalf of the United States being duly sworn, testified as follows:

I am the Entrance and Clearance Clerk in the Collector's Office, and have charge of the reports of Masters of Vessels in port. I have examined the records to see whether or not Captain O'Hagan, as captain of the "Giulia," reported on the 15th, 16th, 17th and 18th day of September with reference to

(Testimony of J. G. Kenny.)

being in distress on this coast line and have found no report. The law is silent with reference to reporting vessels in distress, but any vessel coming into the jurisdiction of the Customs District has to report if they are coming into port for 24 hours, unless they are coming in for fuel only.

Cross-examination.

If the boat was at the bottom of the sea I do not know whether the captain would have to report it.

Thereupon the Government rested its case and Wilford H. Tully, on behalf of the defendant G. Campanelli, renewed all the motions heretofore made and the Court made its order denying said motions to which the defendant duly and regularly excepted. [196]

CHARGE TO THE JURY.

The COURT (Orally).—Now, Gentlemen of the Jury, you have heard the testimony in this case, protracted as it has been, and the argument of counsel, the narration of the facts and their conclusions drawn therefrom. It now becomes the duty of the Court to state as briefly as it may the issues which you are to determine, and the rules of law by which you are to be guided in arriving at your verdict.

In a case of this character, the court and jury have separate functions to perform. It is the duty of the Court to pass upon all questions of law and advise the jury as to the rules by which they are governed in arriving at their verdict, and it is your

duty to accept as law whatever the Court states to you to be the law, whether it meets with your approval or not. If at any time the Court is in error or has committed an error in its ruling, there is a tribunal organized and constituted for the purpose of curing that error; but if you should assume to decide a question of law and decide erroneously, there would be no remedy, and no method of correcting the error. So that is your duty to take the law as given to you by the Court. It is, however, your duty and your exclusive province to pass upon all questions of fact in the case, and to draw all conclusions and references from the testimony; and the Court has no more right to invade your province and attempt to determine a question of fact than you have to evade its province and attempt to determine a question of law. The responsibility for the law of the case is upon the Court, but the responsibility for the facts and the conclusions drawn therefrom are upon the jury.

The case on trial is based on an indictment returned by the Federal Grand Jury of this district in November of last year, charging some 24 individuals with the crime of conspiring and confederating together to violate a law of the United States; 15 only of those individuals are on trial. Of this number, 12 are members of the crew of the steamer "Giulia," one O'Hagan was the captain of the steamer, and the other two defendants are Campanelli, whom I think [197] you will have no difficulty, from the evidence, in identifying, and De Maria. For the purpose of identification only, you

will recall that De Maria was the man whom the Government claims purchased coal for this vessel at San Diego, and Campanelli was the man whom the Government claims was present at the conference between the Captain and McMillan in this city, at the time the arrangement was made for the captain to take charge of this boat, and was at San Diego at the time the boat was purchased, and in Havana when it was loaded. I state this simply for the purpose of identification, and not as any indication of what the proof is in regard to these matters.

This indictment is brought under section 37 of the Penal Code, which reads:

"If two or more persons conspire either to commit an offense against the United States, or defraud the United States in any manner or for any purpose, and one or more of such parties do any act to effect the object of the conspiracy, each of the parties to such conspiracy shall be punished, if convicted," as in the statute provided. It is under that section that this indictment was framed. These defendants are not charged with a violation of any of the prohibition laws of the United States, nor are they charged with smuggling goods into the United States, but the specific charge against them is that they entered into an agreement to do these things, and that in furtherance of that agreement one or more of the conspirators performed some of the acts for the purpose of accomplishing it.

It is important, therefore, at the outset, that you should have a clear conception of what is constituted a crime under this section, and of the evidence necessary to establish it. I, therefore, repeat the statute. It is that if two or more persons conspire to commit an offense against the United States, and one or more of such parties do any act to effect the object of the conspiracy, each of the parties thereto shall be guilty of a crime. You will observe that there are three essential elements necessary to constitute a crime under this statute. First, there must be the act of [198] two or more persons conspiring and confederating together. One person, of course, cannot conspire himself, and, therefore, there must be at least two persons acting together to constitute a conspiracy. Second, it must appear that the purpose of the conspiracy was to commit an offense against the United States, that is, to violate some law of the United States. And, third, one or more of the conspirators, after the conspiracy has been formed, and during its existence, must do some act to effect the object thereof. Each of these acts is an essential ingredient of the crime charged, and must be established to your satisfaction and beyond a reasonable doubt before you can find a verdict of guilty. But if those three elements are established, then the crime of conspiracy is complete, regardless of the fact as to whether the purpose of it was accomplished, or not.

By *was* of illustration, and illustration only, if two persons should enter into a conspiracy or agree-

ment to violate, we will say, the prohibition law by the possession of *an* dealing in intoxicating liquors, and one of such persons, in pursuance of that agreement, and during its existence, should rent a room and fit it up for the purpose of engaging in this business, the crime of conspiracy would be complete, and they would be guilty of conspiracy, although, as a matter of fact, they never possessed any intoxicating liquors or sold them. So that it is important to keep that in view in a case of this character, that it is not the substantive offense that these defendants are charged with, but it is conspiracy or agreement to commit that offense, and the performance of some act in furtherance of that agreement.

Now, taking these up in their order: A conspiracy is a combination of two or more persons, by concerted action, to accomplish a criminal or an unlawful purpose. A common design is the essence of a conspiracy, and it is, therefore, necessary, in order to prove a conspiracy, for the evidence to show a combination of two or more persons by concerted action to accomplish a criminal purpose. It is not necessary, however, for the Government to prove that such parties met together and entered into an explicit or formal agreement to that effect, or that they directly, by word or in writing, stated what the unlawful [199] scheme was to be, or the details of the plan or means by which it is to be made effective. A conspiracy may be, and usually is, shown and proven by circumstances. Persons who contemplate committing a crime do not ordin-

arily place their intentions in writing, or enter into any formal agreement for that purpose, but their agreement or understanding is generally to be determined from their acts and their conduct, and the entire circumstances surrounding their relationship and the transaction. Guilty connection with a conspiracy may be established by showing the association of the persons accused in and for the purpose of prosecuting the illegal object. It is enough if the minds of the parties met understandingly, so as to bring about an intelligent and deliberate agreement to do the acts and commit the offense charged, although such agreement be not manifest by formal words. While the conspiracy may be proven by circumstantial evidence, yet the circumstances relied on for the proof must be such as to show that there was a common agreement or understanding, and the mere fact that two or more persons on different occasions did acts of similar nature, looking toward the same end, or result, would not constitute, as a matter of law, a conspiracy, unless there was a common design and intention. The evidence must show that the parties accused, and each of them, agreed and confederated together to do the acts charged. In other words, there must be a co-operation and concert of action. Each party to the conspiracy must be actuated by the intent to pursue a common design, but each may perform separate acts or hold distinct relations in promoting such design. That is, if two or more persons pursue, by their acts, the same object by the same means, one performing one part and another

another part, so as to complete it with a view to attaining the object they are pursuing, that would be sufficient to constitute a conspiracy. Nor is it necessary that the conspirators should be acquainted with each other, or that each should know the exact part to be performed by the other in execution of the common design. It is enough if two or more persons in any manner or through any contrivance positively or tacitly come to a mutual understanding to accomplish a common unlawful design. In other words, where [200] persons, actuated by a common purpose to accomplish that end, work together in any way in pursuance of the unlawful scheme, every one of such persons becomes a member of the conspiracy, although the part that he is to take therein is a subordinate one, and is to be executed at a remote distance from the other conspirators.

Again, one who, after a conspiracy is formed, with knowledge of its existence, joins therein and aids and participates in its execution, becomes as much a party thereto from that time as if he had been an original conspirator. Furthermore, where two or more persons are proven to have combined and confederated together for some illegal purpose, any act done by one of the conspirators during the pendency of the conspiracy, with the common design of furthering the common object, is, in law, the act of all; and, therefore, proof of such act will be evidence against any one of the others who is engaged at that time in the same conspiracy.

It is also true that any declaration of one of the conspirators in furtherance of the conspiracy, or in the execution thereof during the pendency thereof, is not only evidence against himself, but evidence against the other parties then members of the conspiracy, who are as much responsible for such declarations and acts to which it relates as if made or committed by them. This rule applies to the declarations and acts of a conspirator, although he may not be under prosecution or on trial; but his declarations and acts, if made in furtherance of the conspiracy, are equally admissible with those of the parties under indictment and being tried; but the declaration of a conspirator not in execution of the common design is not evidence against any of the parties other than the one making such declaration. One cannot be made a member of a conspiracy except by his own conscious act, and not by the acts and declarations of another.

Now, the second element of the crime charged is that the conspiracy had for its purpose to commit an offense against the United States. The laws of the United States make it a crime for any person to possess, deal in, or dispose [201] of intoxicating liquor, and it is also a crime to import intoxicating liquors into the United States, and the charge in this case is that this conspiracy was formed for the purpose of violating those laws.

The third essential element of the crime charged is that one or more of the conspirators did, after the conspiracy was formed, and during its existence, do some act to effect the object thereof.

Now, with these general observations, we come to the particular crime charged against the defendants, and that is to be determined by the terms of this indictment. It charges, after setting out the law of the United States, which makes it a crime to deal in intoxicating liquors, and forbids the importation of intoxicating liquors into this country, that on or about the 1st of February, 1924, the exact date being to the grand jurors unknown, these several defendants named in the indictment, including not only the fifteen on trial, but the nine that are not on trial, entered into a conspiracy to violate the prohibition laws of the United States, and to violate the laws prohibiting the importation of intoxicating liquors. It is charged that that conspiracy continued and was in force at the time of the alleged commission of the overt acts herein charged. It is then charged in the indictment that in pursuance of this conspiracy, and for the purpose of effecting the objects thereof, these defendants did, in the month of July, 1924, cause the steamer "Giulia" to be loaded with intoxicating liquors at Havana, Cuba, and to sail from Havana, Cuba, destined for the waters off San Francisco Harbor; and it is also charged that after the boat arrived off the harbor certain liquors were delivered to a boat called the "Gnat"—two deliveries, I believe, to the "Gnat," and one to a boat called the "Shark"; and the loading of the "Giulia" at Havana, the delivery of liquor from the "Giulia" to the "Gnat" off the harbor of San Francisco, and the alleged delivery of the

liquor to the "Shark" off the harbor are the overt acts charged in the indictment.

Now, the first question for you to determine in this case is whether [202] or not two or more of the parties charged in this indictment entered into a conspiracy or agreement to violate the laws of the United States by dealing in intoxicating liquors, or by importing them into this country, in violation of law; and, second, whether one or more of the conspirators did one or more of the acts charged in this indictment for the purpose of carrying that conspiracy into effect. If you find and believe beyond a reasonable doubt as I shall hereafter define that term to you, that such a conspiracy was formed by two or more of the parties charged in the indictment, whether they are on trial or not, and that the object of the conspiracy was to violate the laws of the United States as charged in the indictment, and that one or more of the conspirators during its existence did one or more of the acts charged in the indictment in furtherance of that conspiracy, then it will be necessary for you to determine whether or not the parties now on trial were parties to such conspiracy, either at its inception or became parties thereto afterwards, with knowledge of its purpose. If they were parties at the time of the conception of the conspiracy, then, of course, they would be guilty of a violation of the law if the overt acts were performed by any one of the conspirators. If they were not parties at the time of the inception of the conspiracy, but afterwards became a party, knowing the purpose and

object of the conspiracy, and thereafter participated in for the purpose of carrying it out, they would become parties to the conspiracy from that time on, and liable just the same after that as if they had been one of the original conspirators.

Now, the defendants in this case have each entered pleas of not guilty. This is a criminal case. Their pleas puts in issue every material allegation of the indictment, and imposes upon the Government the burden of proving the essential allegations to your satisfaction and beyond a reasonable doubt before you would be justified in finding any of them guilty. At the beginning of this trial they were each clothed with a presumption of innocence, and that presumption continues with them throughout the trial, until it is overcome by the testimony. It is not incumbent on a defendant in a criminal case to [203] prove his innocence, but it is incumbent on the Government to prove his guilt, and that to the satisfaction of the jury beyond a reasonable *dount.*

Now, by reasonable doubt I do not mean a mere captious doubt, and I do not mean such a doubt as a juror might conjure up in his own mind, based upon his non-approval of the law under which the prosecution is had, or upon the argument of counsel, or upon any matters of that kind, but I mean a real, substantial doubt, based either upon the testimony or the want of testimony, such a doubt as would cause a reasonably prudent man to hesitate to act in his own important affairs. If, after you have considered all of this evidence, you enter-

tain such a doubt, then you should give the defendants the benefit of that doubt and an acquittal. If, on the other hand, you do not, then it is your duty to find in favor of the Government.

Now, the indictment in this case charges a specific offense, and it is upon that charge that these parties are on trial. As I stated to you at the beginning, they are not on trial for violating the prohibition law, they are not on trial for dealing in intoxicating liquors, they are not on trial for buying intoxicating liquors, and they are not on trial for importing intoxicating liquors into the United States, but they are on trial under an indictment charging them with a conspiracy or an agreement to commit such offenses, and, therefore, the mere fact, if it is a fact, that one of the defendants may have purchased liquor from some of the other defendants, or some unknown person, would not be sufficient to warrant a conviction of conspiracy. A person or persons purchasing liquor which is being illegally sold does not by this act alone become guilty of the offense of conspiracy, it must appear that he was co-operating in the unlawful design and the unlawful purpose of the conspiracy.

Now, gentlemen, you are the exclusive judges of the credibility of the witnesses, and the exclusive judges of all questions of fact in this case. Every witness is presumed to speak the truth. The law assumes that every person who comes into Court and takes an oath to tell the truth, the whole [204] truth, and nothing but the truth, does so. This presumption, however, may be overcome by the

manner in which a witness testifies, by his appearance on the witness-stand, or by contradictory testimony. You have heard these witnesses, you have noticed their appearance on the witness-stand, and now it is for you, and you alone, to say what weight should be given to the testimony of each and every one of them. Under your oaths, you are to take into consideration only such evidence as has been admitted by the Court, and you should, in obedience to your oaths, disregard and discard from your mind every impression or idea suggested by questions asked by counsel which were objected to, to which objections were sustained. The defendants are to be tried only on the evidence that is before you, and not on suspicions that may have been excited by questions of counsel, answers to which were not permitted or which were stricken out by the Court. And I caution you to distinguish carefully between the testimony offered here by a witness on the stand and statements and arguments made by counsel as to what facts have been proven. If there is a variance between the two, you must, in arriving at your verdict, consider only the facts testified to by the witnesses, and the evidence offered and admitted, together with the instructions of the Court. Your personal opinion as to facts not proved cannot in any manner be considered or used by you as a basis for your verdict. You may believe, as men that certain facts exist, but, as jurors, you can only act upon the evidence introduced upon this trial, and from that evidence, and that alone, under the instructions of the Court, you must find your ver-

dict, unaided, unassisted, uninfluenced by any opinion, or presumption, or belief you might have, except the presumption of innocence, not formed from the testimony. Mere probabilities are not sufficient to warrant a conviction, nor is it sufficient that the greater weight or preponderence of the evidence supports the allegation of the indictment, nor is it sufficient that upon the doctrine of chance it is more probable that the defendants are guilty than that any are innocent; to warrant a conviction, the defendants must be proved to be guilty clearly and beyond a reasonable doubt. [205] If there is any reasonable theory upon which you can reconcile the evidence, consistent with the innocence of the defendants, it is your duty to do so.

If, as I have stated to you, it should appear beyond a reasonable doubt that some of the things charged as overt acts in this indictment were committed by particular defendants, and they were, themselves, in violation of the law, the commission of such acts, standing alone, is not sufficient, of itself, to warrant a conviction, unless you also find, beyond a reasonable doubt, that such act or acts were performed to effect the object of the conspiracy then existing, as charged, and to which conspiracy the defendant or defendants performing such act or acts was or were at that time a party. Briefly, this means that no overt act by any of the defendants is sufficient to warrant a conviction of himself or any of the other defendants, unless you find that a conspiracy existed, as charged, and that

such act was performed to effect the object of the conspiracy.

Now, the fact that some of the defendants have not testified in their own behalf in this trial should not be considered or construed by you as against them, and you are not at liberty to indulge in any unfavorable presumption or inference because they have not testified. The indictment is not evidence, and it should not be considered by this jury as evidence; it is a formal matter provided by law, by which a defendant accused of crime may be put on trial; its purpose is to inform a defendant of the particular charge made against him, so that he may come into court prepared to meet it, and to advise the Court and jury of the issues which they are expected to determine.

Now, there was testimony introduced in this case of a man by the name of Alioto, as I recall his name; he was the owner, or alleged to have been the owner of a boat that he testified was hired by one of these defendants for the purpose of sending out supplies to this boat and bringing liquor in. Now that, of course, was a violation of law, and in weighing Alioto's testimony it is important for the jury to keep that fact in mind; and, so far as his testimony contradicted, it would be your duty to scrutinize it with care and [206] caution, because of the circumstances under which this arrangement was made, and the subsequent acts and conduct of the Government officers with relation to Alioto. So far as I recall—I may be in error about it, and if I am you are not to accept my statement—but so far

as I am concerned there was no contradiction of Alioto's testimony. Of course, if you think he was telling an absolute untruth, perjuring himself on the witness-stand, you would have the power to disregard his testimony entirely.

There was introduced during the trial numerous statements or alleged statements made by various defendants to the Government officers. These statements were made after this conspiracy, if any, was ended, and, therefore, the statements made by these individuals are not evidence against anybody except themselves; and, as I tried to point out to you numerous times during the trial, you will not consider as evidence against anyone else any statements that they may have made tending to implicate some other person. You can readily understand that it would be a very dangerous rule to permit a man who had been arrested for a crime to implicate other people by statements that were made at that time, and, for that reason, the evidence should be disregarded by you, and should be treated as if such statements had not been made. But the statements made by these people, if freely and voluntarily made, are competent evidence as against themselves and should be considered by the jury as against the party making the statement. Now, in weighing the statements, you should consider the circumstances under which they were obtained; if they were not voluntarily made, or if they were made under promise of immunity, or inducement of any kind, they should be disregarded; but if they were freely and voluntarily made you should give them such

weight as you think they are entitled to. And in judging them, as I said, you should take into consideration the circumstances under which they were made, the time they were made, and those that are not signed—I believe there was perhaps one that was signed, the captain's—those that were not signed, of course, depend upon the recollection of the testimony of those who testified here as to what the statements were. [207]

Now, so far as the captain of this boat is concerned, Captain O'Hagan, it appeared in evidence from his statement, and from the papers that were found in his possession, that he stipulated, so he claims, that no delivery of liquor should be made within the territorial waters of the United States. But if this liquor was loaded aboard his boat, in pursuance of the conspiracy to transport it and smuggle it into the United States, and he was a party to the conspiracy and knew of it at the time, and participated in it, and with knowledge of that fact brought his boat off San Francisco harbor, it would be no defense to him, under this indictment, that he stipulated that the delivery should not be made within the territorial waters of the United States. He is not on trial for smuggling liquor into the United States; he is not on trial for violating the laws of the United States in that respect, but he is on trial for entering into a conspiracy to do so, and it is immaterial, so far as he is concerned, under this indictment, whether he was to make delivery within the territorial waters of the United States, or out of the territorial waters, if he joined this

conspiracy, if there was a conspiracy, with the purpose, and intent, and knowledge that these liquors were to be smuggled into the United States; so that the stipulation in the manifest, or whatever you may call it, that he was not to make delivery within the territorial waters of the United States, would be no defense if he was a party to this conspiracy. Indeed, it might be, I think, a fact for the jury to consider in determining whether he was a conscious party to the conspiracy, if there was a conspiracy, that before he began the voyage he insisted that there should be such a stipulation in his manifest. If, as a matter of fact, he understood that these goods were to be shipped from Havana to Vancouver, British Columbia, and were not to be smuggled into the United States, it might be inquired why he was so anxious as to require a stipulation that in case he made delivery to be taken into the United States, that such delivery should be made within the territorial waters.

Now, so far as his connection with the matter is concerned, you are to determine from the evidence in this case and say whether you believe, beyond a reasonable doubt, that at the time he accepted the captaincy of this boat and [208] took on board a cargo at Havana, and then navigated the boat, brought the boat up off San Francisco Harbor, he knew that it was the purpose of the parties to smuggle liquor into the United States, and if he did then he is guilty of conspiracy to violate the laws of this country.

Now, so far as the crew is concerned, the question

with reference to the crew will be whether or not they were conscious participants in this alleged conspiracy, if there was a conspiracy; if they were not, then they ought not be convicted; if they shipped on this boat knowing that its purpose was to deliver liquor into the United States in violation of the laws of the United States, and with that knowledge continued on the boat, assisted in its navigation, then they were members of the conspiracy, and ought to be convicted. If, on the other hand, they were acting in good faith, supposed that the boat was going to Vancouver, and not to this country, then they ought not be convicted. They are, of course, mere servants or employees of the boat, and their acts should be considered by this jury keeping that fact in view, and if you do not believe beyond a reasonable doubt that they were conscious participants in the conspiracy, if there was one, then you ought to acquit them. If, on the other hand, you do so believe, then you should find them guilty.

So far as Campanelli and De Maria are concerned, you have heard the evidence with reference to their connection with this matter. It is a question for you to say whether they were conscious participants in this conspiracy, if there was a conspiracy; if they were acting as co-*conspiracy,* assisting in the completion of the scheme, then from the time they became such they would be guilty with the other conspirators. I need not refer to the testimony with reference to them, because you have heard and remember it as well as or better than I do, and it is

for you now to say, under your oaths, whether they or either of them were conscious participants in this conspiracy.

Now, some of the ship's papers, a manifest, and papers of that kind, have been introduced in evidence. Now, these papers are not evidence, and should not be considered by you as evidence tending to connect the defendants other [209] than the captain with the alleged conspiracy; but if it appears from the testimony to your satisfaction, and beyond a reasonable doubt, that the other defendants were parties to this conspiracy or co-conspirators, then the papers might be considered, and properly considered, by the jury in determining the purpose and object of the conspiracy, but not for the purpose of establishing it as against the other defendants.

This covers all the questions of law that occur to me in this case. It will be necessary for you to find a verdict as to each one of these defendants, that is, a verdict of guilty or not guilty. I think you will have no difficulty in keeping them separated. As I said at the beginning, 12 are members of the crew, Captain O'Hagan, De Maria and Campanelli.

It is necessary that your verdict should be unanimous, that is, that you should all agree upon any verdict that you render. After you have retired, you can select one of your members as foreman, who will sign the verdict such as you may render, upon your behalf.

Are there any exceptions from counsel?

Mr. WILLIAMS.—The Defendant De-Maria has no exceptions.

Mr. TULLY.—Just for the purpose of the record, I have not checked up every instruction I submitted to your Honor, I wish to note an exception to the failure to give my instructions 1 to 41 inclusive.

The COURT.—Just one general exception?

Mr. TULLY.—Yes.

The COURT.—Very well. You may have it. You may retire now, gentlemen. [210]

(Thereupon, at 10:50, the jury retired and subsequently returned into court at 4:00 o'clock P. M. returned into Court with a verdict of guilty as to Defendants Campanelli and Captain O'Hagan, and not guilty as to the remainder.) [211]

In the Southern Division of the United States District Court for the Northern District of California, First Division.

No. 15,828.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

GUISEPPI CAMPINELLI et als.,

Defendants.

VERDICT.

Jose Aberlion ..... Not Guilty.
J. Bermudez ..... Not Guilty.
W. J. Blackmore ..... Not Guilty.
Robert Castagno ..... Not Guilty.
Guiseppi Campinelli ..... Guilty.
J. L. Daniel ..... Not Guilty.
John B. DeMaria ..... Not Guilty.
Manuel C. Gonzales ..... Not Guilty.
J. O'Hagan ..... Guilty, leniency recommended.
Guiseppi Marcardi ..... Not Guilty.
Cresentino C. A. Massino ..... Not Guilty.
Manuel Sanchez Novo ..... Not Guilty.
Ramiro Basterrechea Reguero ..... Not Guilty.
Antonio D. Rilo. ..... Not Guilty.
August Rodney. ..... Not Guilty.

(Signed) BRACE CARTER,
Foreman.

[Endorsed]: Filed Mar. 7, 1925, at 4 o'clock P. M. Walter B. Maling, Clerk. By Lyle D. Morris, Deputy Clerk. [212]

In the Southern Division of the United States District Court for the Northern District of California, First Division.

No. 15,828.

UNITED STATES OF AMERICA,
Plaintiff,

vs.

GUISEPPI CAMPINELLI et als.,
Defendants.

JUDGMENT ON VERDICT OF GUILTY.

Conv. Viol. Sec. 37, C. C. U. S. (Cons. to Viol. National Prohibition Act).

Kenneth C. Gillis, Esq., Assistant United States Attorney, and the defendant with his counsel, came into Court. The defendant was duly informed by the Court of the nature of the indictment on the 12th day of November, 1924, charging him with the crime of violation of Sec. 37 C. C. U. S. (Cons. to Viol. National Prohibition Act), or his arraignment and plea of not guilty; of his trial and the verdict of the jury on the 7th day of March, 1925, to wit:

We, the Jury, find as to the defendants at bar as follows:

Jose Aberlion ..... Not Guilty.
J. Bermudez ..... Not Guilty.
W. J. Blackmore ..... Not Guilty.
Robert Castagno ..... Not Guilty.
Guiseppi Campinelli ..... Guilty.

J. L. Daniell ..... Not Guilty.
John B. DeMaria ..... Not Guilty.
Ramiro Basterechea Regueno, ... Not Guilty.
Antonio D. Rilo, ... Not Guilty.
August Rodney, ... Not Guilty.
Manuel C. Gonzales, ... Not Guilty.
J. O'Hagan ..... Guilty, leniency recommended.
Guiseppi Mancardi ..... Not Guilty.
Cresention C. A. Massino ..... Not Guilty.
Manuel S. Novo ..... Not Guilty.

The defendant was then asked if he had any legal cause to show why judgment should not be entered herein and no sufficient cause being shown or appearing to the Court and the Court having denied a motion for a new trial and a motion in arrest of judgment thereupon the Court rendered its judgment;

THAT, WHEREAS, the said Guiseppi Campinelli, having been duly convicted in this Court of the crime of violating Sec. 37, C. C. U. S. [213] (Conspiracy to violate National Prohibition Act),—

It is THEREFORE ORDERED, ADJUDGED AND DECREED, that the said Guiseppi Campinelli be imprisoned for the period of two years in the United States penitentiary at Leavenworth, Kansas, and pay a fine in the sum of Five Hundred Dollars;

IT IS FURTHER ORDERED, that in default of the payment of said fine that said defendant be further imprisoned until said fine be paid or until he be otherwise discharged, in due course of law.

Judgment entered this 10th day of March, A. D. 1925.

WALTER B. MALING,
Clerk.
By C. W. Calbreath,
Deputy Clerk. [214]

In the Southern Division of the United States District Court for the Northern District of California, First Division.

No. 15,828.

UNITED STATES OF AMERICA,
Plaintiff,

vs.

GUISEPPI CAMPINELLI et als.,
Defendants.

MOTION FOR ORDER VACATING VERDICT OF JURY AND GRANTING NEW TRIAL.

The defendant Guiseppi Campinelli hereby moves this Honorable Court for an order vacating the verdict of the jury herein and granting to the said defendant a new trial for the following causes, and each of them, materially affecting the constitutional rights of the said defendant.

I.

Said verdict was contrary to the evidence adduced upon the trial hereof.

II.

Said evidence was insufficient to justify said verdict.

III.

Said verdict was contrary to law.

IV.

That the Court erred in his instructions to the jury, in refusing the defendant's instructions and in deciding questions of law arising during the course of the trial hereof, which errors were duly excepted to.

This motion is made upon the minutes of the Court, and all other records and proceedings in the above-entitled cause. [215]

Dated: San Francisco, California, March 10, 1925.

WILFORD H. TULLY,

Attorney for Defendant Guiseppi Campinelli. [216]

In the Southern Division of the United States District Court for the Northern District of California, First Division.

No. 15,828.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

GUISEPPI CAMPINELLI et als.,

Defendants.

MOTION IN ARREST OF JUDGMENT.

Now comes Guiseppi Campinelli, one of the defendants in the above-entitled cause, and respectfully moves the Court to arrest and withhold judgment in the above-entitled cause, and that the verdict of conviction of said defendant heretofore given and made in said cause be vacated and set aside and declared to be null and void, and of no force, virtue or effect for each of the following reasons and causes:

I.

It appears upon the face of the record herein that no judgment can be legally entered against the said defendant for the following reasons, to wit:

(1) The facts stated in the indictment on file herein, and upon which said conviction was and is based, do not constitute a crime or public offense within the jurisdiction of this Court.

(2) That said indictment does not state facts sufficient to charge the said defendant with any crime or offense against the United States.

(3) The said indictment does not state facts sufficient to charge the said defendant with having conspired to commit any crime or offense against the United States. [217]

(4) That the said indictment does not state facts sufficient to charge the said defendant with any crime against the United States, in this,

to wit, that all and singular the matters, things, and acts which the said indictment alleges that said defendant conspired to do are not nor is any of said matters, things or acts a crime under any law or statute of the United States of America.

II.

That this Honorable Court has no jurisdiction to pass judgment upon said defendant by reason of the fact that the said indictment failed to charge said defendant with any crime against the United States; and, further, that this Honorable Court has no jurisdiction to pass judgment upon the said defendant by reason of the fact that the testimony introduced in the trial of said cause showed or tended to show that a crime, if any, had been committed outside of the Northern District of the State of California, and in a foreign jurisdiction

WHEREFORE, by reason of the premises the said defendant prays of this Honorable Court that judgment herein be arrested and withheld, and that the conviction of said defendant be declared null and void.

Dated: March 10, 1925.

WILFORD H. TULLY,

Attorney for the Defendant, Guiseppi Campinelli.

[218]

In the Southern Division of the United States District Court for the Northern District of California, First Division.

No. 15,828.

UNITED STATES OF AMERICA,

Complainant,

vs.

J. O'HAGAN et al.,

Defendants.

PRESENTATION OF BILL OF EXCEPTIONS AND NOTICE THEREOF.

The defendant Guiseppe Companelli hereby presents the foreging as his proposed bill of exceptions herein, and respectfully asks that the same may be allowed.

WILFORD H. TULLY,

Attorney for Defendant Guiseppe Companelli.

To Sterling Carr, United States Attorney, Northern District of California, and Kenneth C. Gillis, Assistant United States Attorney:

Sirs: You will please take notice that the foregoing constitutes and is the proposed bill of exceptions of the defendant Guiseppe Companelli in the above-entitled cause, and that said defendant will ask for the allowance of the same.

WILFORD H. TULLY,

Attorney for the Defendant, Guiseppi Companelli,

[219]

In the Southern Division of the United States District Court for the Northern District of California, First Division.

No. 15,828.

UNITED STATES OF AMERICA,

Complainant,

vs.

J. O'HAGAN et al.,

Defendants.

STIPULATION FOR SETTLEMENT AND ALLOWANCE OF BILL OF EXCEPTIONS AND ORDER MAKING BILL OF EXCEPTIONS PART OF THE RECORDS.

It is hereby stipulated that the foregoing bill of exceptions is correct, and that the same be settled and allowed by the Court.

April 2d, 1925.

STERLING CARR,
United States Attorney.
KENNETH C. GILLIS,
Asst. United States Attorney,
WILFORD H. TULLY,
Attorney for Defendant, Guiseppe Companelli.

[220]

In the Southern Division of the United States District Court for the Northern District of California, First Division.

No. 15,828.

UNITED STATES OF AMERICA,

Complainant,

vs.

J O'HAGAN et al.,

Defendants.

CERTIFICATE OF JUDGE SETTLING BILL OF EXCEPTIONS.

This bill of exceptions having been duly presented to the Court and having been amended to correspond with the facts, is now signed and made a part of the records in this cause.

Dated: March ——, 1925.

_____,

Judge.

This bill of exceptions having been duly presented to the Court and having been amended to correspond with the facts, is now signed and made a part of the records in this cause.

Dated: Apr. 2, 1925.

A. F. ST. SURE,

Judge.

Receipt of a copy of the within is hereby admitted this 18 day of March, 1925.

STERLING CARR,
United States Attorney.
KENNETH C. GILLIS,
Asst. United States Attorney. [221]

[Endorsed]: Lodged Mar. 18, 1925. Walter B. Maling, Clerk. By C. M. Taylor, Deputy Clerk. Filed Apr. 2, 1925. Walter P. Maling, Clerk. By C. M. Taylor, Deputy Clerk. [222]

In the Southern Division of the United States District Court for the Northern *Division* of California, First Division.

No. 15,828.

UNITED STATES OF AMERICA,
Complainant,

vs.

J. O'HAGAN et al.,
Defendants.

PETITION FOR WRIT OF ERROR.

Now Comes Guiseppe Companelli, one of the defendants in the above-entitled action, and brings this his petition for writ of error to the Southern Division of the District Court of the United States for the Northern District of California, and in that behalf your petitioner shows:

On the 10th day of March, 1925, there was made,

rendered and entered in the above-entitled Court and cause, a judgment against your petitioner, wherein and whereby your petitioner, the said Guiseppe Companelli, was adjudged and sentenced to imprisonment for the term of Two Years in the Federal Prison at Leavenworth, Kansas, and fined the sum of Five Hundred Dollars ($500.00); and your petitioner shows that he is advised by Counsel and avers that there was and is manifest error in the records and proceedings had in said cause, and in the making, rendition and entry of said judgment and sentence to the great injury and damage of your petitioner, all of which errors will be more fully made to appear by an examination of the said record, and an examination of the bill of exceptions to be tendered and filed and in the assignment of errors presented herewith; and to that end that the said judgment, sentence and proceedings may be reviewed by the United States Circuit Court of Appeals for [223] the Ninth Circuit, your petitioner now prays that a writ of error may be issued, directed therefrom to said Southern Division of the District Court of the United States for the Northern District of California, according to law and the practice of the Court, and that there may be directed to be returned pursuant thereto a true copy of the record, bill of exceptions, assignment of errors, and all proceedings had in the said cause, that the same may be removed unto the United States Circuit Court of Appeals for the Ninth Circuit, to the end that the errors, if any have happened may be duly

corrected, and full and speedy justice done to your petitioner; and that during the pendency of this writ of error, all proceedings in this court be suspended and stayed and that through the pendency of said writ of error the defendant Guiseppe Companelli be admitted to bail in the sum of Five Thousand Dollars ($5000.00).

Dated: March 17th, 1925.

WILFORD H. TULLY,
Attorney for Petitioner.

Due service and receipt of a copy of the within petition is admitted his 18th day of March, 1925.

STERLING CARR,
U. S. Attorney.

[Endorsed]: Filed Mar. 18, 1925. Walter B. Maling, Clerk. By C. M. Taylor, Deputy Clerk. [224]

In the Southern Division of the United States District Court for the Northern District of California, First Division.

No. 15,828.

UNITED STATES OF AMERICA,
Plaintiff,

vs.

GUISEPPI CAMPINELLI et als.,
Defendants.

ASSIGNMENT OF ERRORS ON BEHALF OF DEFENDANT GUISEPPI CAMPINELLI.

Guiseppi Campinelli, a defendant in the above-entitled cause, and the plaintiff in error herein, having petitioned for an order from said Court permitting him to procure a writ of error to this Court directed from the United States Circuit Court of Appeals for the Ninth Circuit, from the judgment and sentence made and entered in said cause against said Guiseppi Campinelli, the plaintiff in error herein, now makes and files with said petition the following assignment of errors herein upon which he will rely for a reversal of the judgment and sentence upon the said writ, and which errors and each and every one of them are to the great detriment, injury and prejudice of the said Guiseppi Campinelli, and in violation of the rights conferred upon by law; and he says that in the record and proceedings in the above-entitled action, upon the hearing and determination thereof in the Southern Division of the District Court of the United States for the Northern District of California, there is manifest error to which exceptions were duly taken in this, to wit:

I.

The Court erred in overruling the demurrer of the defendant Guiseppi Campinelli to the indictment herein upon [225] the grounds in said demurrer alleged, to wit:

"1.

That each count of the indictment against him

and the matters and things set forth in each of the several counts in the indictment herein are not sufficient in law to compel the defendant to answer to the said indictment in that it does not appear therein nor can it be ascertained therefrom:

a. Of what crime, if any, the defendant herein is thereby charged.

b. What statute of the United States, if any, the defendant herein has violated.

c. Whether the above-named defendant at any time or at all, possessed, in the United States, intoxicating liquor for beverage purposes.

d. Whether the above-named defendant wilfully, unlawfully, feloniously, knowingly and fraudulently imported and brought into the United States and within the jurisdiction of this court certain merchandise contrary to law, as alleged in subdivision 'b' of paragraph 6 of said indictment or whether he assisted in importing or bringing into the United States and within the jurisdiction of this court merchandise contrary to law, as therein alleged.

e. Whether the said motor boat described in subdivision 'a' of paragraph VIII of said indictment actually did transport, deliver, import and bring into the United States, to wit: San Francisco Bay and within the jurisdiction of this court said portion of said cargo of intoxicating liquor.

f. How or in what manner the above-named defendant Guiseppi Campinelli conspired, combined, confederated and agreed together with others to perform the alleged illegal acts.

2.

The facts stated in the indictment do not constitute an offense against the laws of the United States. [226]

3.

That there is no sufficient showing in the said indictment of unlawful means by the above-named defendant Guiseppi Campinelli in the carrying out of the said alleged conspiracy.

4.

That the said indictment, for the reasons hereinabove alleged and specified, is insufficient to enable the said defendant Guiseppi Campinelli to make his defense or to properly inform him of the charges against him or to enable one of common understanding to know and understand the nature of the charges against him.

5.

That said indictment is not sufficient in form or substance to enable the above-named defendant Guiseppi Campinelli to plead any judgment thereon in bar of other prosecution for the same offense."

II.

The Court erred in overruling and denying defendants motion for an order vacating the verdict of the jury and granting defendants a new trial upon the following grounds:

1.

Said verdict was contrary to the evidence adduced upon the trial hereof.

2.

Said evidence was insufficient to justify said verdict.

3.

Said verdict was contrary to law.

4.

That the Court erred in his instructions to the jury, in refusing the defendant's instructions and in [227] deciding questions of law arising during the course of the trial hereof, which errors were duly excepted to.

III.

That the Court erred in overruling defendant's motion in arrest of judgment upon the grounds in said motion stated and assigned as follows:

1.

The facts stated in the indictment on file herein, and upon which said conviction was and is based, do not constitute a crime or public offense within the jurisdiction of this court.

2.

That said indictment does not state facts sufficient to charge the said defendant with any crime or offense against the United States.

3.

That said indictment does not state facts sufficient to charge the said defendant with having conspired to commit any crime or offense against the said United States.

4.

That said indictment does not state facts suffi-

sufficient to charge the said defendant with any crime against the United States in this, to wit, that all and singular the matters, things and acts which the said indictment alleges that said defend-

ant conspired to do are *nor* nor is any of said matters, things or acts a crime under any law or statute of the United States of America.

That this Honorable Court has no jurisdiction to pass judgment upon said defendant by reason of the fact that the said indictment failed to charge said defendant with any crime against the United States; and, further, that this Honorable Court has no jurisdiction to pass judgment upon the said defendant by reason of the fact that the testimony introduced [228] in the trial of said cause showed or tended to show that a crime, if any, had been committed outside of the Northern District of California, and in a foreign jurisdiction.

IV.

The Court erred in making, giving and rendering judgments against the defendant for the reason that said indictment does not state any crime or any offense against any law of the United States and for the reason taken and assigned by the defendant in his motion in arrest of judgment.

V.

The Court erred in overruling the motion to dismiss the action made on behalf of the defendants upon the ground that the indictment shows upon its face to have been voted by the alleged Grand Jury after the expiration of its term and upon the further ground that it does not appear affirmatively on the face of the indictment that the members of the alleged grand jury were sworn before they proceeded to determine what was pending before them.

VI.

The Court erred in admitting the following testimony over the objections of the defendant therein noted:

"Q. Did you have occasion to visit Pier 16 in this city on April 10th, of 1924? A. I did.

Q. Just where is that located?

A. It is at the end of 16th Street.

Q. This city?

A. It is what is called the 16th Street Pier.

Q. That is in this city? A. Yes.

Q. Did you see the 'Mae Heyman' at that time?

A. I did. [229]

Q. What boat was that?

A. The 'Mae Heyman'; and we afterwards counted the sacks, which numbered 119, that had already been taken out of hold #1.

Q. Out of the hold of the boat onto the pier?

A. From the hold of the boat onto the pier. They were removing them while we were standing behind the pile of lumber.

Q. You made a seizure, then at that time?

A. We seized the boat and the liquor and arrested the men.

Q. How much liquor? A. 1,705 cases.

Mr. WILLIAMS.—The pleading is very general in scope, and the testimony here relates to a boat called the 'Mae Heyman' and as this evidence comes in at this particular time we desire at this time to move to strike it out, because it does not appear that it is relevant to this conspiracy in any possible manner.

The COURT.—Of course the Government cannot develop its case at one time.

Mr. WILLIAMS.—I know that, I know your honor will rule against me, but I want to take an exceptions to your Honor's ruling and then I can reserve a motion to strike it out?

The COURT.— Yes, unless the Government connects it up with these defendants.

Mr. WILLIAMS.—I ask for an exception and the privilege of renewing the motion later on.

Mr. TULLY.—May that go as to all the defendants.

The COURT.—Certainly, you all understand the Government cannot develop its case all at one time [230]

Mr. WILLIAMS.—We renew our motion, if your Honor please.

The COURT.—It will be overruled.

Mr. WILLIAMS.—Exception.

Mr. WILLIAMS.—Did you take any of these defendants into custody at that time?

A. I did not.

The COURT.—What did you say in answer to his question?

A. I did not arrest any of these defendants.

Q. None of these defendants? A. No.

Mr. VINCILIONE.—I ask on behalf of the crew that the evidence of the last witness be stricken out as being hearsay, not being connected with any of the defendants represented here.

The COURT.—As I stated a moment ago, the Government cannot put on its case at one time. The motion will be denied."

VII.

The Court erred in admitting the following testimony over the objections of the defendant therein noted:

"Q. In the spring of 1923 did you become acquainted with a man by the name of Daniel Henderson? A. Yes, I did.

Q. And a man by the name of Guyvan McMillan?

A. Yes, I did.

Q. Did you see them quite frequently from that time up to March, 1924?

A. I saw them, yes, most every few days; I had occasion to go into the office in the morning to see what they were doing in regard to the mine; some days I would see Mr. Henderson, but Mr. McMillan was there most of the time; [231] he seemed to be secretary or acting as secretary to Mr. Henderson.

Q. At any of the times that you saw Mr. McMillan, or Mr. Henderson, did you have any conversation with either of them with reference to the smuggling of liquor into this country by either of those individuals.

Mr. WILLIAMS.—Just a moment; I just want to preserve my record on behalf of the defendant DeMaria. I object to the testimony as immaterial, irrelevant and incompetent, hearsay, and there is no foundation laid at this time as to the connection of the defendant DeMaria with this conspiracy.

The COURT.—I will overrule it.

Mr. WILLIAMS.—We note an exception.

Mr. TULLY.—I make the same objection on behalf of the defendant Campinelli.

The COURT.—I do not think it is necessary to take up the time of the Court in making motions of this kind, because, as I said, if this evidence is not connected up it will be withdrawn from the jury.

Mr. TULLY.—May I make the further objection that any declarations made by a co-conspirator are inadmissible at this time because the conspiracy is not proven, and I wish to reserve an exception.

Q. Was there anything in any of the conversation said abou the ship 'Ardenza'? A. Yes.

Q. What was that?

A. Well, I originally started with a man named Manning who came in and was to put in a certain amount of money into the mining venture. After about a month and a half he brought in Mr. Henderson and Mr. Stevens, and represented them to me as being English capitalists with a [232] world of money, both multi-millionaires, and wanted to know if I had any objection to their putting some money in, in his interest, that he was not able to carry the whole interest on himself; so I said I had no objection at all. At that time I met Mr. Stevens, who was supposed to be the owner of the 'Ardenza,' which came out in the papers later was his ship.

Q. Anything said about the ownership of the cargo of liquor that was aboard the 'Ardenza'?

A. Mr. Henderson claimed he owned the cargo.

Q. Did he state where the boat 'Ardenza' was at that time? A. Yes.

Q. Where? A. Right outside the Heads, here.

Q. That is, outside of San Francisco?

A. Yes, right off the bay.

Q. Did you ever hear or see anything about a black book that Henderson had?

A. (Mr. TULLY.) We object to this line of questioning, your Honor, and also suggest we cannot see any materiality of it with reference to the particular case here, nothing said that involves any of these other defendants who are on trial. This is bringing in matter we know nothing at all about.

The COURT.—He can answer the question. The objection is overruled.

Mr. TULLY.—Exception.

A. I saw a black book there at one time, and when I wanted him to vacate the office, or give up the other office, he told me that that represented so many thousand cases of whiskey, and he had it there as coal. I said, [233] 'What are you doing with so many tons of coal at the mine, we do not use only a little bit of blacksmithing coal.' And he said, 'That represents a cargo that I have outside, and when I sell that I will have available money to go on? . . . .

Mr. WILLIAMS.—With all due respect to your Honor, we again renew our motion to strike out all of the testimony as being hearsay.

The COURT.—It will be overruled.

Mr. WILLIAMS.—Note an exception. . . . .

Q. You saw Mr. McMillan? A. Yes.

Q. I will show you a bill, Mrs. Cohen, to the King Coal Co., and ask you if you recognize that?

A. I do not recognize the bill, but I know that I paid it.

Q. You paid a bill to the King Coal Co.

A. Yes.

Q. On December 5, 1923?

A. Thereabouts, I don't remember the date.

Q. Do you remember about how much it was?

A. No. It was quite a bit.

Q. Over $300.00?

A. I would not. It was in currency.

Q. It was in currency? A. Yes.

Q. Did you pay the bill yourself? A. Yes.

Q. Who gave you the money to pay it?

A. Mr. McMillan.

Mr. WILLIAMS.—If your Honor please, this transaction, as I understand, relates to a period in December, 1923. While they are not restricted to the exact date of the alleged conspiracy, on or about February, 1924, that is a couple of months or so before. We object to this testimony [234] as anterior to the time of the conspiracy that is alleged to have been entered into.

The COURT.—I suppose the Government is leading up to it.

Mr. GILLIS.—Yes.

The COURT.—Overruled.

Mr. WILLIAMS.—Exception.

Mr. GILLIS.—Who gave you the currency to pay this bill? A. Mr. McMillan.

Q. That is, Guyvan McMillan? A. Yes.

Mr. GILLIS.—That is all.

Mr. WILLIAMS.—I would like to make the same motion with regard to that.

The COURT.—Overruled.

Mr. WILLIAMS.—Exception."

VIII.

The Court erred in permitting, over the objections of the defendant that it was incompetent, immaterial and irrelevant and had no foundation laid nor conspiracy then proved, the reading to the jury of an alleged statement purporting to have been signed by the defendant John O'Hagen, and made after his arrest and after the completion of the alleged conspiracy, which statement purports to involve the defendant Guiseppi Campanelli.

IX.

The Court erred in admitting, over the objections of the defendant upon the ground that it was incompetent, immaterial and irrelevant and no foundation laid nor conspiracy then proved, and a mere scrap of paper, an alleged part of a manifest of the boat "Guilia," marked "U. S. Exhibit No. 1" taken from the person of the [235] defendant O'Hagan at the time of his arrest, as appears from the following quotation of the testimony:

"Q. I show you one, evidently a part of a manifest, and ask you if that is one of the papers which was taken, part of the papers of the 'Guilia's' Crew? A. Yes, it is.

Mr. CONNOLLY.—I object on the ground that it is not the best evidence; this purports to be a copy of the original document. Furthermore, the document was prepared, evidently, and executed in a foreign country, it is nor properly authenticated, so that it can be received in evidence at this time, or at any time throughout the trial. Furthermore, it is a copy, and not the best evidence. I object on those grounds.

Mr. GILLIS.—It was seized or taken from the captain of the 'Guilia,' and is part of the ship's papers.

Mr. TULLY.—May I make the further objection that no foundation has been laid. . . . .

The COURT.—It will be received in evidence. (The document was marked 'U. S. Exhibit 1.')

Mr. TULLY.—May we reserve an exception?

The COURT.—Certainly. . . . .

Mr. GILLIS.—I desire to call the attention, of the jury to this instrument. 'Anglo Cuban Steamship Co.,' a receipt for 8,418 packages of merchandise, listed as 7,223 packages of whiskey, 400 packages of gin, 40 packages of rum—223 packages of liquors, 200 packages of champagne, 2 case cigars, Vancouver, in transit. Consignees to have the option, weather permitting, to take delivery on the high seas, but in no case, and under no circumstances, is delivery to be made within 20 miles of any territory, and then only on the Pacific Coast, within a radius of a line drawn due west of San Diego and a line due west of Seattle, [236] always at least 20 miles

from such described coast or territories. All island territories within this described area to be taken as the measurement point for such deliveries, if made, in order to conform with a recent treaty made between Great Britain and the U. S. A. Also, should the maximum speed of any vessel taking delivery be more than 15 miles per hour, such excess speed must be added to the delivery distance from the within described area."

IX.

The Court erred in admitting over the objections of the defendant upon the grounds that it was incompetent, immaterial and irrelevant and no foundation laid, an unsigned letter, taken from the person of the defendant O'Hagan, at the time of his arrest, written in the Italian language, marked "U. S. Exhibit 5," and its English translation, a copy of the English translation being as follows:

"Mazatlan, Mexico, August 11, 1924.

"Mr. G. Campanelli,

"17 Columbus Avenue,

"San Francisco, Cal.

"Sir:

"Today towards evening we are ready to leave and I believe that it would be well to send you this letter in order to explain to you better than by means of a telegram the things that have happened since we arrived in Mazatlan.

"We arrived here Monday morning at 3:00 o'clock and were anchored as best we could in the Bay of Mazatlan because here there is no port

or rather there is no wharf. Later on in the morning when the customs officials came on board and inspected the documents, the Captain only was permitted to go ashore in order to despatch the business connected with the boat. In view of the fact that I was not able to go on shore with him, I requested him to send the telegram [237] asking the sum of $3,000, which at that moment I considered sufficient to pay the expense of the coal which here costs $29.00 a ton in addition to other loading charges, which loading is done entirely by men who belong to the union and who load only the amount of coal which the union designates, and in any event they will not work for less than 3 Mexican pesos an hour.

"In the meantime the day passed and after dinner I obtained permission to go ashore with the Captain, and the first thing I did was to send a telegram confirming the one sent by Hagen precisely, because having understood that he had sent the telegram in his own name, naturally would not send the money. That being done and believing that you would thus understand, I then went to see the agent and the Consul to make necessary arrangements and then returned on board.

"In the meantime the railroad company, which is the only concern here that has coal, informed us that they would not begin the work of loading the coal on the launch until the money had been paid to their representative here. The Carbon must be taken from the warehouse belonging to them which is located about 9 miles from

where our boat is anchored, which place, like all of the Bay of Mazatlan, is a very bad place at night-time, so much so that all of the ships which arrive here during the night remain in the open sea until daybreak, because of the dangers of the port itself.

"We waited the entire day of the 6th without any news, which we anxiously awaited in order to enable us to leave as soon as possible.

"On the 7th a fire broke out in the ship's coal bunkers, a fire which was caused by spontaneous combustion on account of some water having entered into the bunkers during the terrible storms which we have here so often. They did the [238] best they could to take about 35 tons of coal from the bunkers, but the gas which was developed from the fire became so strong and unbearable that the men could not breathe and they were obliged to have recourse to the pumps to throw water on the bunkers and use their pumps to pump it out again. But the fire, notwithstanding all this water, did not diminish. On the contrary, removing the coal allowed the air to penetrate better and consequently the coal burned stronger than before and continued to produce even more gas.

"It was finally decided to call the Captain of the Port and Lloyd's Agent, and also an agent, for their advice. They immediately came on board and advised us to call for help from shore and to do everything needful as soon as possible, otherwise the boilers might blow up and the ship

entirely destroyed. We took their advice and sent for all the men we could get from the shore, who set to work with the members of our crew and worked with all possible speed and energy during the entire night to save the ship. We then took a few hours of rest and on the morning of the 8th the men were called on board from shore as well as the members of our own crew and recommenced their work and continued working with much energy until 5:00 o'clock in the evening, at which hour the men who came on board from the shore returned to the city and our own crew continued to work by themselves.

"On the morning of the 9th the flames began to subside, and by throwing water on the coal towards noon on the 9th the fire was completely under control and the ship's bunkers then contained very little coal indeed, which was pulled up to the deck in sacks, which sacks we were obliged to buy, and the carbon was heaped together on the deck with the rest of it.

"The result of the fire was that the bottom of the ship's bunkers, being made of wood, was two-fifths burned [239] away. A lead pipe for carrying water was also burned together with other minor inconveniences, all of which was repaired by the crew, and when the marine insurance agent came on board a second time to inspect the ship, and the damages caused, and the work done, he expressed himself as highly satisfied with everything.

"In the meantime I had received your tele-

gram asking me what was the matter, to which I replied asking $4,000 instead of $3,000 on account of the accident which had befallen the ship above described. Afterwards I received notice from the bank that they had an order to pay me $3,500. I at once went ashore with the Captain and the English Consul, received the money, opened two accounts with the same bank, one in Mexican pesos and one in dollars; I had with me enough money to pay for the carbon; also went to finish burying other articles and afterwards went to see the coal bunkers and promised a small tip to the superintendent if he would handle the job of loading the coal promptly and well.

"On the 10th I received another telegram saying that you had sent me 7 telegrams and asking a reply to each of the seven. I am satisfied I answered every telegram that I received, because as you can easily understand, as I myself understood, that because of an unfortunate combination our various telegrams had crossed each other on their way and for that reason I thought it was a waste of time and money to do any more telegraphing.

"I have dated this letter in advance, dating it tomorrow, because I will not be able to post this letter. However, I expect to write you again when we get to sea on the evening of the 10th, but in this moment everything is going along nicely on board.

"I am endeavoring in every possible way to

work for [240] your interest in everything, and when we arrive I want you to ask anybody on board if in their opinion whatever I have done on board has not been done in perfect good faith, and if I have not done everything on board possible to protect your interests. The insurance agent has assured me that all the expense in connection with fighting the fire will be repaid to us by the insurance company. The work of loading the coal will commence tomorrow, Monday the 11th of August at 7 in the morning, and I firmly believe that by midday on that day all will be loaded and everything all right. The provisions will also arrive during the morning, so I am not in a position to tell you precisely the hour of our departure. We have calculated that in order to arrive at the point designated it will take us eight days, but in case we are favored with good weather or favorable winds we will be able to make the trip in 7½ days, so that leaving Mazatlan Monday night we ought to be at the post designated on the 18th of this month, after dinner, always understanding that no unfortunate accident occurs.

"I beg of you when you come on board, or send on board, to send us the precise hour, or in nautical terms that which they call Greenwich mean time. I make this request because the Captain says the chronometer we have on board is not much good. The Captain also asks that you bury for him a sextant made by Heath, possibly a second

hand one, because the one he has has been injured by the water and is not in good condition.

"After we pay all the expenses, if there is money enough left, I think it will pay us to make another return voyage.

"When you come on board do not forget to bring mail, and if there is not any, if you want to do me a grand favor, send to the postoffice on 7th street and ask if there [241] is any mail for me and if so, bring it along with you.

"I will not tell you now everything that happened to us during the voyage, especially in Cuba and Panama, but I will tell you all about it and other very interesting things when we see each other. I think it is better that I not say any more but I will tell you all about it when I see you.

"I have already advised you that from the ship load some cases have disappeared for several reasons.

"With cordial regards to everybody."

X.

The Court erred in admitting, over the objection of the defendant noted, an instrument taken from the person of the defendant O'Hagan, at the time of his arrest, marked "U. S. Exhibit 2," written in a foreign language, which purports to show Guyvan McMillan to be the proprietor or owner of the "Guilia," as more particularly appears from the following testimony:

"Q. I show you another instrument, Mr. Creighton, and ask you if this is one of the instruments

that was taken from Captain O'Hagan, of the steamer "Guilia"?

The COURT.—Is the Captain one of the defendants in this case?

Mr. GILLIS.—The Captain is, and is present in court.

Mr. McDONALD.—Have you a translation of this?

Mr. GILLIS.—No, I have not. I ask that this be introduced in evidence and marked Government's Exhibit next in order.

Mr. VINCILLONE.—We object on behalf of the crew that it is not binding on them, immaterial, irrelevant and incompetent and hearsay.

Mr. TULLY.—We make the same objection, and not intelligible in its present form, and no foundation has been laid. [242]

The COURT.—Overruled.

Mr. GILLIS.—This document is in a foreign language, but the jury can decipher enough of it to see it is for the boat 'Guilia,' which was formerly the 'Frontiersman,' and the proprietor or owner of it is Guyvan McMillan, of Vancouver, British Columbia."

(The document was marked U. S. Exhibit 2.)

XI.

The Court erred in admitting, over the objection of the defendant, an instrument taken from the person of the defendant O'Hagan at the time of his arrest, marked "U. S. Exhibit 3," which purports to be a manifest of a cargo shipped on board the steamship "Guilia," Captain John O'Hagan,

at Havana, Cuba, for Vancouver, B. C., as more particularly appears from the following quotation from the testimony:

"Mr. GILLIS.—I ask that this be introduced in evidence and marked U. S. Exhibit next in order.

(The document was marked U. S. Exhibit 3.)

Mr. VINCILIONE.—The same objection, if your Honor please.

Mr. TULLY.—The same objection.

The COURT.—Yes. . . . .

Mr. GILLIS.—It is a manifest of the steamer 'Guilia,' which lists the same number.

Mr. WILLIAMS.—If it is offered because it was gotten in the possession of this particular witness from Captain O'Hagan, all right, but if the United States Attorney is going to characterize this as a manifest, it is immaterial, irrelevant and incompetent, not admissible, because the Courts have repeatedly held that manifests cannot be admitted in evidence unless the authenticity has been proven. [243]

Mr. GILLIS.—It has written on it 'Manifest of Cargo shipped on board steamship "Guilia," Captain John O'Hagan, at Havana, for Vancouver,' and lists the same liquors that I read in the other instrument."

XII.

The Court erred in admitting over the objections of the defendant that it was incompetent, irrelevant and immaterial and no foundation laid nor conspiracy then proved, *n*oral testimony of H. S. Creighton, concerning the alleged unsigned state-

ment of the defendants Daniels and Rodney, made after their arrest, and after the completion of the alleged conspiracy, which purported to involve the defendant Guiseppi Campinelli, as more particularly appears from the following quotations from the testimony:

"A. This is a statement that Daniell said, he said he was in doubt about the next statement—I don't know whether this is proper.

Q. Yes.

A. He said that he was in some doubt, but it might have been Louie that brought Joe and Ricardo ashore. When Joe came ashore he wore a .38 pistol and a belt of cartridges strapped around his waist.

Ricardo? Campinelli, and two others came on the 'Nat' with the provisions. After the conditions on the 'Guilia' became so bad, the crew finally stole all the weapons the captain had and threw them overboard. Daniell was not able to identify either the 'Mallhat' or the 'Quadra' by name. He referred to them as a five-masted Schooner and another ship. Rodney said that he could identify John De Maria, having been on board the 'Guilia' in Ensenada, with Joe Campinelli, and the man whom Joe called his cousin. Joe and Ricardo came to the Farallones on board the 'Guilia' and a launch brought them to shore. [244] There is some doubt on the part of Rodney but this may have been Louis who took them ashore. When Joe came ashore he wore a .38 pistol and a belt of cartridges strapped around his waist. Later the

'Nat' brought out provisions, consisting of the following provisions, potatoes, canned milk, Armours bacon and corned beef, oranges, apples, flour, celery, tomatoes, cabbages, eggs. Ricardo, Campinelli and two others came on the 'Nat' with the provisions. At this time they took no liquor back with them, but soon afterwards they brought some coal, and on that voyage and each other time they took back liquor ashore with them. There was some uncertainty on the part of Rodney but he believes Joe Campinelli came out one time later on the 'Nat,' but he did not remain, he went right back ashore with a load of liquor."

XIII.

The Court erred in admitting, over the objections of the defendant, upon the ground that it was incompetent, irrelevant and *im*, no foundation was laid and no conspiracy then proved, a book taken from the person of the defendant O'Hagan at the time of his arrest which is described as a record of the ship's transactions and of the members of the crew, which book contained a reference to the defendant Guiseppe Campinelli that was read to the jury by the prosecuting attorney, as more particularly appears from the following quotations from the testimony:

"Mr. GILLIS.—I show you a book and ask you if you recognize that book? A. Yes, I do.

Q. Was that one of the books that was received from Captain O'Hagan similar to other ship's papers that were taken from him?

A. This book was turned over to me at the same time by Captain O'Hagan. [245]

Mr. GILLIS.—I ask that this book be introduced in evidence and marked Government's exhibit next in order.

Mr. TULLY.—We make the objection that it is immaterial, incompetent and irrelevant, the proper foundation has not been laid, it is hearsay, the handwriting has not been proved, there is nothing here to show its materiality in any sense whatsoever. . . . .

The COURT.—It will be admitted then.

Mr. TULLY.—Just a moment before your Honor makes a ruling. That is a mere statement on account of counsel; he has not proved the *identy* of the book.

The COURT.—He got it from the Captain though.

Mr. GILLIS.—Yes. . . . .

Mr. GILLIS.—I desire to call the jury's attention to this book; it is an ordinary day-book starting out on April 15, 'Mr. Blackmore engaged as engineer, Mr. Daniell engaged as second engineer, and certain payments made to those individuals. Gerbaudo, Patrick Walsh and other members of the crew mention.' The next page, May 15, shows a list of the Captain, the engineer and second engineer, and certain members of the crew. On the next page, May 15, it shows morning at San Pedro, and the captain and the chief and second engineer and mate and certain members of the crew there; it runs on the 16th, on the 17th, on the 18th, on the

19th, on the 20th, 21st; on the 21st is a note that Mossino changed from a sailor to fireman, and another man from fireman to sailor. Received from Mr. Campinelli $1000.00. Campinelli left for San Francisco and certain payments made to the crew. On the 22nd are still shown certain payments made to the crew clear on down to the 23rd. On the 23rd again it shows a man engaged as a sailor at $98.00. Received from McMullen $2200.00; paid Spreckles for coal $1700.00 and it runs on, and there are certain days, the 27th down to June 3rd it just [246] gives the date without any reference to what they were doing. Here on June 11th are certain payments to the crew, on the 12th and 13th, 14th, until we get down to the 20th day of June, which is the last item shown, Havana Harbor 7:30 A. M.

Mr. TULLY.—I wish to assign as prejudicial error the reading from that book of a reference to any other defendant than Captain O'Hagan.

The COURT.—You can make the objection."

XIV.

The Court erred in admitting the following testimony over the objections of the defendant therein noted, as more particularly appears from the following quotations from the testimony:

"Mr. GILLIS.—Your position is what, Mr. Grable?

A. Secretary of the King Coal Co. . . . .

Q. What is that, Mr. Grable?

A. It is a receipt that we give, or rather take,

from people who take coal from our bunkers at our Oakland plant.

Q. That is a receipt that was given for coal delivered to what steamer?

A. The 'Mae Heyman.'

Q. The date is December 5, 1923? A. Yes.

Q. Do you know of your own knowledge that coal was delivered from your dock to the 'Mae Heyman'? A. It was . . . .

Mr. TULLY.—Just a minute. At this time we will object on the ground it is immaterial, irrelevant and incompetent, I cannot see what the purpose of this is at all. . . . .

Mr. TULLY.—It does not tend to prove any of the allegations of the indictment.

The COURT.—It is offered against McMillan and [247] Henderson alone?

Mr. GILLIS.—No, the act of one co-conspirator is the act of all.

The COURT.—You would have to show that these other people were partners in this conspiracy at that time. About when was this? This was in 1923, was it not?

Mr. GILLIS.—This was December 5, 1923.

The COURT.—We have not had any evidence up to this time connecting them with the transaction in December, 1923. . . . .

The COURT.—I think it is competent as against McMillan and Henderson.

Mr. TULLY.—May we reserve an exception?

The COURT.—Whether the other people are bound by it would depend upon what the evidence

shows was their connection with the conspiracy, if they were connected with it at all.

Mr. GILLIS.—I ask that it be introduced in evidence and marked Government's exhibit next in order.

(The document was marked U. S. Exhibit 9.)

. . . .

Q. Do you remember whether you made deliveries of coal to the 'Mae Heyman' after this date?

A. Yes, we did.

Q. How late a date?

A. Into January, the latter part of January.

Q. 1924. A. 1924. . . . .

Q. As foreman of the King Coal Co., did you supervise the delivery of any coal to the 'Mae Heyman'? A. Yes.

Mr. TULLY.—We make the same objection.

The COURT.—All right.

Mr. TULLY.—And take an exception. [248]

The COURT.—Yes.

Mr. GILLIS.—Do you know of your own knowledge that the coal was actually in those two months delivered to the 'Mae Heyman.'

A. Yes.''

XV.

The Court erred in admitting, over the objection of the defendant, Guiseppi Campinelli, made upon the ground that they were not made freely and voluntarily but were made under promise of immunity, an alleged signed statement of the defendant Guiseppi Campinelli and two alleged oral statements, made after his arrest and after the comple-

tion of the alleged conspiracy, as more particularly appears from the following quotations from the testimony:

"Q. Why did you say to Mr. Campinelli then, 'We might want to use you as a witness'?

A. Well, did I say that?

Q. You can refer to the record if you think that my statement is incorrect.

A. It is quite probable that I did make such a statement to him at the time when he said that he wanted to plead guilty. . . . .

Q. And you expected him to aid the Government again by bringing in other cancelled checks?

A. Yes. . . . .

Q. Then you expected and relied upon Mr. Campanelli to furnish you such information?

A. I sought information from Campinelli, because I believe that he had a lot of available information that he could give, and he seemed very willing to give it on the first occasion. [249]

Q. You say you expected him to act in good faith?

A. Good faith in this, that he had agreed to tell me everything, and to give me all the evidence of his relations with these other men, and this 'Guilia' affair, and he had failed to do so, and in that he was failing to show his good faith. . . . .

Q. What did you say?

A. I said to Mr. Oftedahl, 'Now, does this case look real bad'? And he did not answer anything, and I said, 'Now, this fellow, what shall I do with him? Do you want him to plead guilty, or has he got any line of defense'? Oftedahl said he might

plead guilty and he might refer the matter to the District Attorney and the District Attorney might turn it over to the presiding judge, or arrange leniency in his case, and then I suggested that in that case, probably, I said he would come out with a fine, a nominal sum of money, probably $300, and Oftedahl said nothing; I thought that was the silent understanding.

Q. You conveyed that information, did you, Mr. Bracini, to Mr. Campinelli?

A. On my own initiative I said to Campinelli, 'The best thing you can do is to plead guilty.'

The COURT.—Was that before or after he made the statement?

A. After he made the statement.

Mr. TULLY.—Had he signed the statement up till that time?

A. No, he refused, on the ground that his attorney advised him not to sign anything.

The following is a copy of the alleged signed statement of the defendant Guiseppi Campinelli: [250]

November 5, 1924.

Joe Campanelli, when interviewed in the office of the Intelligence Unit, on November 5, 1924, in the presence of Guido Braccini, states

That he does not distinctly recall how he first became acquainted with Mr. Manning of the Colombo Buillion Mines Syndicate, about a year or so ago; that he did purchase several cases of whiskey, possibly fifty, from Mr. Manning, who, as he under-

stands it, was only in San Francisco for two or three weeks;

That Manning made him acquainted with Henderson, with whom he had dealings from time to time, and at Henderson's invitation he visited at the latter's rooms in the Stanford Court Apartments, where he saw Ruth Adele Smith, whose picture he has identified and who Henderson spoke of as 'Pat';

That it was Henderson who made him acquainted with Guyvan McMillan; that he got to be pretty well acquainted with Henderson, who was quite liberal with his funds and paid him sums of money at times amounting from $50.00 to $100.00, and on several occasions he purchased quantities of liquor from Henderson; that several months ago Henderson invited him, Campanelli, to go along on a trip to Havana, Cuba, for the purpose of obtaining liquors, and in that connection he learned that Henderson owned a ship called the 'Giulia,' which was being sent to Havana for the purpose of securing a cargo;

That he went along with Henderson on a trip to Havana at the latter's expense, and that Johnny DeMaria joined them on this trip, which was made by train; that he (Campanelli) had no connection whatever with DeMaria and as he understands it DeMaria was making the trip for his own [251] interests. Upon arrival of this party at Miami, Florida, Henderson met with his wife who appeared to be living there at the Granada Apartments, and that the three men after spending about

one week in Miami proceeded to Havana by the boat 'Key West,' where they registered at the Seville Hotel. Campanelli futher states that in conversations which were had from time to time with Henderson he came to know that a supply of liquors was being kept in storage at Havana, which belonged to Henderson, and although Johnny DeMaria traveled along on this venture, he does not know to what extent DeMaria was interested financially or otherwise.

He states that he stayed in Havana for fifteen or twenty days waiting the arrival of the steamer 'Giulia,' after which a cargo of liquors was placed on board; that the liquors which were placed aboard the 'Giulia' were removed from warehouses located on what is know as the San Francisco Pier;

That Henderson seemed to have complete charge of the ship as well as her cargo; that Henderson gave him to understand that most of this liquor had been exported from Scotland where Henderson said he owned a distillery; that Johnny De Maria did not remain in Havana until the arrival of the 'Giulia' but stayed in the city, as he recalls it, no longer than a week. Campanelli remained in Havana until the 'Giulia' was loaded and he does not remember the date on which he left but says he proceeded to New Orleans, where he remained for two or three days. The girl, Ruth Adele Smith, *alias* 'Pat' did not show up at Havana while he was there, he says, nor does he know when Henderson left there, but he is quite certain that Hender-

son did not [252] leave on the 'Giulia.' In parting with Henderson he was given instructions to proceed to San Francisco, and Henderson in referring to himself said: 'I will be there before the boat gets there,' or words to that effect:

Campanelli does not remember the date of his return to San Francisco, and asserts that he received no instructions at Havana with regard to making contact of any kind with the 'Giulia' upon her arrival in the vicinity of San Francisco; that about twenty days or more after leaving Havana he (Campanelli) while at his own office in San Francisco at 17 Columbus Avenue, received a telephone call from Henderson, inviting him to the Clift Hotel on Geary Street. On this occasion they simply visited together in the room which was being rented by Mr. Henderson. On that occasion Henderson told him that there were about 8500 cases of liquor aboard the 'Giulia,' and he would like to have Campanelli's assistance in the matter of disposing of the cargo. Henderson offered to pay him $1.00 a case as a commission for the assistance which he had rendered or might render with regard to the disposal of these liquors, and it was figured out that he would receive at least $8500.00 on the deal;

Henderson stated that Alioto, a foreman for the Booth Fishing Co. of San Francisco, who had assisted in the unloading of liquors on previous occasions would help in the matter of unloading the 'Giulia' and he (Campanelli) was requested to get in touch with Alioto, which he did. He states

that he informed Alioto of Henderson's purpose to pay him at the rate of $2.50 a case for every one unloaded from the 'Giulia' and that Alioto agreed to arrange for bringing in liquors from the ship at that rate; he told Alioto that Henderson expected the boat to arrive on a certain fixed date, which he does not recall at this time. [253]

That about one week after his visit with Henderson at the Clift Hotel, Henderson met with him again and they visited together in the office on Columbus Avenue, where he was informed of the fact that the 'Giulia' was down in Ensenada in need of coal and provisions and that he, Henderson, would like to have him go down there to help in any way he could to supply the ship. He says that his cousin, Ricardo Campanelli, had no interest whatever, so far as he knows, in the cargo aboard the 'Giulia', but at his request Ricardo gave him a ride by automobile from San Francisco to San Diego. On the way, however, they met with an accident near the city of Los Angeles, and had to make the remainder of the trip by stage to San Diego. The trip from San Diego to Ensenada was made by automobile.

That while in San Diego he met Johnny DeMaria, but was not informed as to the latter's business down there.

That after arrival at Ensenada, he paid a visit to the 'Giulia,' which was then located in the harbor, and received a sum of money from Captain Hogan, with which he purchased a supply of groceries and other provisions which were transferred to the

ship by means of a launch, which was hired for the purpose. Campanelli insists that he had nothnig whatever to do with purchasing any coal for the 'Giulia' nor with transporting the coal to the ship;

That after these provisions were placed aboard he boarded the ship himself and stayed on her until after arrival, about thirty miles south of the Farillone Islands; that he was seasick and was very anxious to reach shore as soon as possible, and that while the ship was lying off the islands he was permitted to go [254] ashore in the first boat which came alongside; he did not notice that the boat had any name or does he have any means of identifying it except that he might know it if he saw it again. This launch did not remove any liquors from the 'Giulia' so far as he knows, and he and his cousin Ricardo were the only passengers. They landed at Pier 17 or 21 at 5:00 or 6:00 o'clock in the evening.

That upon arrival he went to the office where he met with Henderson, who appeared to be waiting for him. In the course of this visit Henderson made inquiries with regard to the condition of the ship and the cargo and was assured that everything was all right. Henderson told him that the first lot brought ashore from the 'Giulia' consisted of about 300 cases.

XVI.

The Court erred in admitting the following testimony, over the objections of the defendant therein noted, as more fully appears from the following quotations from the testimony:

"Q. Have you with you a bank statement of Mr. G. Campinelli? A. I have.

Q. Will you produce that, please?

A. Yes. . . . .

Mr. TULLY.—Objected to on the ground that they are immaterial, irrelevant and incompetent, and no foundation whatever laid, nothing to show this man kept the records, or knows anything about them. It has also to do with an account in the year 1923, long prior to the date fixed in the indictment. [255]

Mr. GILLIS.—It is a complete record of this man's account at the bank, from July 21, 1923,—to when?

The WITNESS.—From the date it was opened to the date it was closed.

Mr. TULLY.—Absolutely no foundation laid, nothing to show this witness had anything to do with it, with the entries, or the keeping of the account?

The COURT.—This is a bank record?

Mr. GILLIS.—That is a bank record.

The COURT.—It will be admitted.

Mr. TULLY.—Exception.

(The document was marked U. S. Exhibit 10.)

Mr. GILLIS.—Q. Have you made a total of these deposits that are shown from this? A. Yes.

Q. What is that total?

A. I just made a total of the deposits.

Q. A total of the deposits is what?

A. $157,611.02.

Mr. TULLY.—The same objection and exception.

The COURT.—Yes."

XVII.

The Court erred in refusing to give the following instruction, requested by the defendant Guiseppi Campinelli, to which an exception was duly and regularly taken:

"You are instructed that if the testimony in this case in its weight and effect be such that two conclusions can be reasonably drawn from it, the one favoring the defendant's innocence and the other tending to establish their guilt, the law demands that the jury shall adopt the former and find the defendants not guilty. In other words, where, as here, the proof relied upon by the Government is purely circumstantial in its character, the circumstances [256] relied upon must so distinctly indicate the guilt of the accused as to leave no reasonable explanation of them which is consistent with the innocence or to state it another way, the circumstances in the proof must be so strong as to exclude every other reasonable hypotheses except the single one of guilt."

XVIII.

The Court erred in refusing to give the following instruction, requested by the defendant Guiseppi Campinelli, to which an exception was duly and regularly taken;

"You are instructed that it is incumbent upon the prosecution in this case not only to prove, to a moral certainty and beyond a reasonable doubt, that the conspiracy, confederation, or agreement alleged to have been entered into by the defendants or some of them, actually existed, but that it

antedated or existed prior to the commission of the overt acts alleged in the indictment to have been committed."

XIX.

The Court erred in refusing to give the following instructions requested by the defendant Guiseppi Campinelli, to which an exception was duly and regularly taken:

"The fact that any defendant has not testified in his own behalf should not be considered or construed in any way against him, and you are not at liberty to indulge in any unfavorable presumption on inference, because he has not testified in his own behalf."

XX.

The Court erred in refusing to give the following instruction requested by the defendant Guiseppi Campinelli, to which an exception was duly and regularly taken:

"If you believe from the evidence herein that any witness was influenced or induced to become such and to testify in this case, bp any promise, express or implied, [257] of immunity from prosecution for any offense or offenses committed by him, then the jury should take such facts into consideration, in determining the weight and credit which ought to be given to testimony thus obtained."

XXI.

The Court erred in refusing to give the following instruction, requested by the defendant Guiseppi Campinelli, to which an exception was duly and regularly taken:

"If you find that any witness has given false testimony as to any material fact, or matter in the case, then I instruct you that you are entitled to treat the balance of his testimony with distrust, and may disregard the same in its entirety."

XXII.

The Court erred in refusing to give the following instruction requested by the defendant Guiseppi Campinelli, to which an exception was duly and regularly taken:

"I instruct you that you are the sole judge of whether any alleged statement made by the defendant Guiseppi Campinelli to Alf Oftedahl, or to any other Government agent, was made freely and voluntarily, and made without promise of immunity or other consideration, and made after he was fully advised of his rights, and made after he was warned that anything he might then say could later be used against him.

XXIII.

The Court erred in refusing to give the following instruction requested by the defendant Guiseppi Campinelli to which an exception was duly and regularly taken:

"In determining whether or not the statement of the defendant Guiseppe Campinelli was free and voluntary, you are entitled to take into consideration the fact that he was brought to the Government agents by a Government [258] representative who afterwards promised him that if he would make a second statement the Government agents would see that he received only a fine and that when he re-

fused to sign said second statement he was arrested late at night and placed under high bail although he was already under bond in this case.

XXIV.

The Court erred in refusing to give the following instruction requested by the defendant Guiseppi Campinelli to which an exception was duly and regularly taken:

"If you find from the evidence that any alleged statement made by the defendant Guiseppe Campinelli to Alf Oftedahl, or to any other Government agent, was not made freely and voluntarily' after the defendant was fully advised of his rights and warned that anything he might then say might later be used against him, and was not made without promise of immunity or other consideration, then I instruct you that you must disregard such statement."

XXV.

The Court erred in refusing to grant the defendant's motion for an instructed verdict upon the grounds that evidence was insufficient to sustain the alleged charge.

XXVI.

The Court erred in refusing to strike out immaterial and prejudicial evidence admitted during the trial.

Dated: March 18, 1925.

WILFORD H. TULLY,

Attorney for Defendant, Guiseppi Campinelli.

Service of the within assignment of errors is hereby admitted this 18th day of March, 1925.

STERLING CARR,
United States Attorney. [259]
KENNETH M. GILLIS,
Assistant United States Atty.

[Endorsed]: Filed Mar. 18, 1925. Walter B. Maling, Clerk. By C. M. Taylor, Deputy Clerk. [260]

In the Southern Division of the United States District Court for the Northern District of California, First Division.

No. 15,828.

UNITED STATES OF AMERICA,
Complainant,

vs.

J. O'HAGAN et al.,
Defendants.

ORDER ALLOWING WRIT OF ERROR AND SUPERSEDEAS.

The writ of error and supersedeas therein prayed for by the defendant Guiseppe Companelli pending the decision upon the writ of error are hereby allowed, and said defendant is admitted to bail upon the writ of error in the sum of Five Thousand Dollars ($5000.00).

The bond for costs upon the writ of error is

hereby fixed at the sum of Two Hundred and Fifty Dollars ($250.00).

Dated: March 18th, 1925.

A. F. ST. SURE,

District Judge of the United States, for the Northern District of California.

[Endorsed]: Filed Mar. 18, 1925. Walter B. Maling, Clerk. By C. M. Taylor, Deputy Clerk. [261]

BOND FOR COSTS.

KNOW ALL MEN BY THESE PRESENTS, That, we, Guiseppe Campanelli, as principal and Luigi Giovannini depositor of Liberty bonds, as sureties, are held and firmly bound unto the United States of America in the full and just sum of Two hundred and fifty ($250.00) dollars, to be paid to the said United States of America certain attorney, executors, administrators or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 18th day of March in the year of our Lord one thousand nine hundred and twenty-five.

WHEREAS, lately at a District Court of the United States for the Northern District of California in a suit depending in said Court, between United States of America and Guiseppe Campanelli, a sentence and judgment was rendered against the said Guiseppe Campanelli and the said

Guiseppe Campanelli having obtained from said Court a writ of error to reverse the judgment in the aforesaid suit, and a citation directed to the said United States of America citing and admonishing it to be and appear at a United States Circuit Court of Appeals for the Ninth Circuit, to be holden at San Francisco, in the State of California.

Now, the condition of the above obligation is such, That if the said Guiseppe Campanelli shall prosecute to effect, and answer all damages and costs if he fail to make his plea good, then the above obligation to be void; else to remain in full force and virtue.

GUISEPPE CAMPANELLI, (Seal.)
LUIGI GIOVANNINI, (Seal.)
Sebastopol, Cal. (Seal)

Acknowledged before me the day and year first above written.

[Seal] FRANCIS KRULL,
U. S. Commissioner, Northern District of California at S. F. [262]

And whereas, under the provisions of section 1320a of the United States Revenue Act, approved February 24, 1919, the undersigned has deposited with Francis Krull, United States Commissioner for the Northern District of California, at San Francisco, the official having authority to take and to approve this penal bond in lieu of surety or sureties certain United States Liberty bonds as follows, viz:

A00894216—2nd Loan—	coupons 14 to 49 inc.	face vl.	.....$100
B00894217—	Same	Same	 100
E0034870—	"	"	 50

And whereas, the above-described United States Liberty bonds are deposited upon the condition and agreement herein given and made that said United States commissioner shall be and he is hereby authorized and empowered to collect or to sell the above described bonds so deposited in case of any default in the performance of any of the conditions or stipulations of such penal bond. Such power to sell or to collect such bonds shall extend to his successor in office. Attached to and made a part of penal bond executed in behalf of Guisepe Campanelli in criminal case No. 15828.

LUIGI GIOVANNINI.

[Endorsed]: Filed Mar. 26, 1925. Walter B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [263]

BOND TO APPEAR ON WRIT OF ERROR.

United States of America,
Northern District of California,—ss.

KNOW ALL MEN BY THESE PRESENTS, that we, Guiseppi Campanelli, as principal, and Fidelity and Deposit Company of Maryland and ———, as sureties, are held and firmly bound unto the United States of America, in the sum of Two Thousand Five Hundred Dollars, to be paid to the said United States of America, for the payment of

which, well and truly to be made, we bind ourselves, and each of us, our and each of our heirs, executors and administrators, jointly and severally by these presents.

SEALED with our seals and dated the 13th day of November, in the year of our Lord, one thousand nine hundred and twenty-four:

THE CONDITION of the above recognizance is such, that, whereas, an Indictment has been found by the United States Grand Jury for the Southern Division of the Northern District of California, and filed on the 12th day of November, A. D. 1924, in the Southern Division of the United States District Court for the Northern District of California, charging the said Guiseppi Campanelli with Section 37 of the Criminal Code of the United States of America unlawfully conspired to violate the National Prohibition Act committed on or about the 1st day of February, A. D. 1924, to wit: at the District and Division aforesaid.

AND WHEREAS, the said Guiseppi Campanelli has been required to give a recognizance, with sureties, in the sum of Two Thousand Five Hundred Dollars for his appearance before said United States District Court whenever required.

NOW, THEREFORE, If the said Guiseppi Campanelli shall personally appear at the Southern Division of the United States District Court for the Northern District of California, First Division, to be holden at the courtroom of said Court in the City and County of San Francisco, on the 17th day of November, A. D.

1924, at ten o'clock in the forenoon of that [264] day, and afterwards whenever or wherever he may be required to answer the said indictment and all matters and things that may be objected against him whenever the same may be prosecuted, and render himself amenable to any and all lawful orders and process in the premises, and not depart the said Court without leave first obtained, and if convicted shall appear for judgment and render himself in execution thereof, then this recognizance shall be void, otherwise, to remain in full effect and virtue.

G. CAMPANELLI. (Seal.)
Address: 1310 Taylor.

FIDELITY AND DEPOSIT COMPANY OF MARYLAND.

[Seal] By E. W. LIVINGLEY,
Attorney-in-fact.

Acknowledged before me and approved the day and year first above written.

[Seal] THOMAS E. HAYDEN,
United States Commissioner, for the Northern District of California, at S. F.

[Endorsed]: Filed Nov. 13, 1924. Walter B. Maling, Clerk. By C. M. Taylor, Deputy Clerk. [265]

In the Circuit Court of the United States in and for the Ninth Circuit.

No. ——.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

GUISEPPE CAMPINELLI et al.,

Defendants.

STIPULATION AND ORDER OMITTING ORIGINAL EXHIBITS FROM PRINTED RECORD.

It is hereby stipulated by and between plaintiff and defendants in the above-entitled action, and their respective attorneys, that the exhibits introduced in evidence at and in the trial of the above-entitled action need not be printed in the record on appeal herein. That the original exhibits as introduced in evidence may, by the Clerk of the trial court, be sent to the Clerk of and filed in said Circuit Court, and be used therein for any and all purposes, the same as if said exhibits had been printed in the said record.

Dated: This 30th day of March, 1925.

STERLING CARR,
United States Attorney.
By KENNETH C. GILLIS,
Asst. U. S. Atty.
WILFORD H. TULLY,
Attorney for Defendant.

So ordered.

HUNT,
United States Circuit Judge.

[Endorsed]: Filed Apr. 7, 1925. Walter B. Maling, Clerk. By C. M. Taylor, Deputy Clerk. [266]

CERTIFICATE OF CLERK U. S. DISTRICT COURT TO TRANSCRIPT ON WRIT OF ERROR.

I, Walter B. Maling, Clerk of the United States District Court, for the Northern District of California, do hereby certify that the foregoing 266 pages, numbered from 1 to 266, inclusive, contain a full, true and correct transcript of the records and proceedings, in the case of the United States of America, vs. Giuseppe Campinelli et al., No. 15,828, as the same now remain on file and of record in this office; said transcript having been prepared pursuant to the praecipe for transcript of record.

I further certify that the cost for preparing and certifying the foregoing transcript on writ of error is the sum of One Hundred Eleven Dollars and Forty-five Cents, and that the same has been paid to me by the attorney for the plaintiff in error herein.

Annexed hereto are the original writ of error, return to writ of error, and original citation on writ of error.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said District Court, this 13th day of April, A. D. 1925.

[Seal] WALTER B. MALING,
Clerk.
By C. M. Taylor,
Deputy Clerk. [267]

WRIT OF ERROR.

UNITED STATES OF AMERICA,—ss.

The President of the United States of America, To the Honorable, the Judges of the District Court of the United States for the Northern District of California, GREETING:

Because, in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said District Court, before you, or some of you, between Guiseppi Campinelli, plaintiff in error, and United States of America, defendant in error, a manifest error hath happened, to the great damage of the said Guiseppi Campinelli, plaintiff in error as by his complaint appears:

We, being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Ninth Circuit, together with this writ, so that you have the same at the

City of San Francisco, in the State of California, within thirty days from the date hereof, in the said Circuit Court of Appeals, to be then and there held, that, the record and proceedings aforesaid being inspected, the said Circuit Court of Appeals may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

WITNESS, the Honorable WM. HOWARD TAFT, Chief Justice of the United States, the 18th day of March, in the year of our Lord one thousand nine hundred and twenty-five.

[Seal] WALTER B. MALING,
Clerk of the United States District Court, Northern District of Calif.

By C. M. Taylor.

Allowed by:

A. F. ST. SURE,
Judge.

Receipt of a copy of the within writ is admitted this 18th day of March, 1925.

STERLING CARR,
U. S. Atty.

[Endorsed]: No. 15,828. United States District Court for the Northern District of California. Guiseppi Campinelli, Plaintiff in Error, vs. United States of America, Defendant in Error. Writ of Error. Filed Mar. 18, 1925. Walter B. Maling, Clerk. By C. M. Taylor, Deputy Clerk. [268]

RETURN TO WRIT OF ERROR.

The answer of the Judges of the United States District Court for the Northern District of California, to the within writ of error:

As within we are commanded, we certify under the seal of our said District Court, in a certain schedule to this writ annexed, the record and all proceedings of the plaint whereof mention is within made, with all things touching the same, to the United States Circuit Court of Appeals, for the Ninth Circuit, within mentioned, at the day and place within contained.

We further certify that a copy of this writ was on the 18th day of March A. D. 1925, duly lodged in the case in this court for the within named defendant in error.

By the Court.

[Seal] WALTER B. MALING,
Clerk U. S. District Court Northern Dist. of Calif.

By C. M. Taylor,
Deputy Clerk. [269]

CITATION ON WRIT OF ERROR.

UNITED STATES OF AMERICA,—ss.

The President of the United States, to United States of America, GREETING:

You are hereby cited and admonished to be and appear at a United States Circuit Court of Appeals for the Ninth Circuit, to be holden at the City of

San Francisco, in the State of California, within thirty days from the date hereof, pursuant to a writ of error duly issued and now on file in the Clerk's office of the United States District Court for the Northern District of California, wherein Guiseppi Campinelli is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

WITNESS, the Honorable A. F. ST. SURE, United States District Judge for the Northern District of California, this 18th day of March, A. D. 1925.

A. F. ST. SURE,
United States District Judge.

Receipt of copy this 18 Mar. 1925, acknowledged.
STERLING CARR,
U. S. Atty.

[Endorsed]: No. 15,828. United States District Court for the Northern District of California. Guiseppi Campinelli, Plaintiff in Error, vs. United States of America, Defendant in Error. Citation on Writ of Error. Filed Mar. 18, 1925. Walter B. Maling, Clerk. By C. M. Taylor, Deputy Clerk. [270]

[Endorsed]: No. 4568. United States Circuit Court of Appeals for the Ninth Circuit. Guiseppi Campanelli, Plaintiff in Error, vs. United States

of America, Defendant in Error. Transcript of Record. Upon Writ of Error to the Southern Division of the United States District Court of the Northern District of California, First Division.

Filed April 13, 1925.

F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

By Paul P. O'Brien,
Deputy Clerk.

No. 4568

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

GUISEPPI CAMPANELLI,
Plaintiff in Error,

vs.

UNITED STATES OF AMERICA,
Defendant in Error.

BRIEF FOR PLAINTIFF IN ERROR,

Upon Writ of Error to the Southern Division of the United States District Court of the Northern District of California, First Division.

WILFORD H. TULLY,
Phelan Building, San Francisco,
Attorney for Plaintiff in Error.

PERNAU-WALSH PRINTING CO., SAN FRANCISCO

No. 4568

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

GUISEPPI CAMPANELLI,
Plaintiff in Error,

vs.

UNITED STATES OF AMERICA,
Defendant in Error.

BRIEF FOR PLAINTIFF IN ERROR,

Upon Writ of Error to the Southern Division of the United States District Court of the Northern District of California, First Division.

STATEMENT OF THE CASE.

Plaintiff in error Guiseppi Campanelli and twenty-three others were charged jointly with conspiring to violate the Act of Congress of October 28, 1919, commonly known as "The National Prohibition Act". The indictment charged that the defendants did, at the Bay of San Francisco, during a period of time beginning on or about February 1, 1924, and continuing to on or about October 8, 1924, conspire and agree to sell, transport, import, deliver, furnish and possess intoxicating liquors for beverage purposes, to-wit: whiskey, wine, champagne, gin and beer, and to import and bring said intoxicating liquor into the

United States. The indictment further charges the following overt acts:

(a) That the defendants did at Havana, Cuba, during the month of July, 1924, cause the steamer "Giulia" to be loaded with about 12,000 cases of intoxicating liquor; that the said steamer "Giulia" left the port of Havana, Cuba, on or about the 7th day of July, 1924, and proceeded to a point about thirty miles from the Farallone Islands; that from that point defendants loaded a portion of said cargo of intoxicating liquors on to the motor boat "Nat" and other motor boats and transported the said liquors into San Francisco Bay;

(b) That the defendants on or about September 7, 1924, unloaded from the said steamer "Giulia" upon the motor boat "Shark" and the motor boat "Nat", about 3000 cases of intoxicating liquors and transported the same by means of the motor boat "Shark" and the motor boat "Nat" into San Francisco Bay;

(c) That the defendants between the 8th day of September, 1924, and the 8th day of October, 1924, unloaded from the steamer "Giulia" upon the motor boat "Shark" and the motor boat "Nat" about 3000 cases of intoxicating liquors, and transported the same by means of the motor boat "Shark" and the motor boat "Nat" into San Francisco Bay.

Fifteen of the defendants named in said indictment, including plaintiff in error, were brought to trial by said indictment on the 2nd day of March, 1925, before Honorable Robert S. Bean, United States District

Judge, presiding. The remaining nine defendants were not brought to trial.

From the evidence it appears that in the latter part of April, 1924, one of the defendants Guivan McMillan employed another of said defendants, John O'Hagan to command the steamer "Giulia", formerly the "Frontiresman", at that time lying in the Los Angeles drydock. O'Hagan took command of the vessel, and left Los Angeles on May 24, 1924, and proceeded to Panama City where a provisional Panamanian registry was procured, which registry showed Guivan McMillan to be the owner. The "Giulia" proceeded to Havana, Cuba, and was there loaded with 8418 packages of merchandise, consisting of whiskey, champagne, gin and other liquors. The defendant Daniel Henderson, accompanied by plaintiff in error, was present at Havana and superintended the loading of the vessel. The "Giulia" sailed from Havana on July 7, 1924, with Vancouver, B. C., as its destination. She proceeded through the Panama Canal to Mazatlan. The vessel encountered bad weather after leaving Mazatlan and the supply of coal became exhausted. Captain O'Hagan was compelled to run back under sail to Ensenada. While at Ensenada a cablegram was sent to McMillan in San Francisco and a short time thereafter plaintiff in error arrived at Ensenada in company with his cousin Ricardo Campanelli. Negotiations were made for a new supply of coal and the vessel proceeded to the Farallones. There is evidence tending to show that a quantity of liquor was unloaded on the "Nat" and one or two other boats, but

there is no evidence showing that any liquor was unloaded upon the "Shark"; that the "Shark" delivered coal to the "Giulia". Henderson accompanied by a woman known as Ruth Adelle Smith, also known as Patricia, came out to the "Giulia" on several occasions and remained there for sometime, Henderson taking charge of the unloading of the boat. Testimony shows that the conditions of the "Giulia" were very bad. The supply of provisions had run out, supply of coal had become exhausted, and there was no water, and finally the ship was abandoned on the 24th day of October, 1924, and she subsequently sank. The captain and the crew got in the life boats and were picked up by the steamer "Brookings", and were brought into San Francisco. The captain and crew were subsequently arrested and were formally charged with conspiracy to violate the "National Prohibition Act". After the sinking of the "Giulia", Henderson and McMillan disappeared and were never brought to trial. It appears that McMillan owed considerable money to the captain and the crew as wages. The defendant O'Hagan made a statement at that time. This statement was admitted in evidence as against the defendant O'Hagan only, and the jury were instructed that said statement was to be considered as evidence against Captain O'Hagan only, and not as against the other defendants. (Trans. pages 69-70.) A purported confession of plaintiff in error was admitted in evidence. (Trans. pages 148 to 153, which confession will be discussed later.)

At the conclusion of the trial the jury rendered their verdict, finding Guiseppi Campanelli, plaintiff in

error, guilty, and defendant John O'Hagan, guilty with leniency recommended, and all other defendants were found not guilty. Defendants Daniel Henderson, Guivan McMillan and Ruth Adelle Smith were not on trial. (Trans. pages 328-329.)

Thereafter, on March 10, 1925, the court rendered its judgment that the defendant John O'Hagan be imprisoned for the period of ten and one-half months in the county jail, at San Francisco, California, and plaintiff in error was ordered to be imprisoned for the period of two years in the United States penitentiary at Leavenworth, Kansas, and to be fined in the sum of $500.00. (Trans. pages 37-39.)

SPECIFICATION OF ERRORS.

The points relied upon by plaintiff in error for a reversal of the judgment rendered against him are as follows:

I.

That there is material variance between the indictment and the evidence introduced upon the trial of said case.

II.

That the court erred in admitting in evidence the testimony of George Michael MacNevin (Trans. pages 49-52), relating to the ownership of the ship "Ardenza" and to the "Black Book" of the defendant Henderson.

III.

That the court erred in admitting in evidence the testimony of Mrs. Juanita Benzel Cohen (Trans.

pages 52-54) with reference to the payment of a bill of the defendant Guivan McMillan to the King Coal Company.

IV.

That the court erred in admitting the testimony of G. L. Lee (Trans. pages 46-49) with reference to the seizing of liquor from the boat "Mae Heyman".

V.

That the court erred in admitting in evidence the Government's exhibit 9 (Trans. page 200), which refers to the King Coal Co. bill for delivery of coal to the "Mae Heyman".

VI.

That the court erred in admitting the testimony of Plinio Compana (Trans. pages 195-199) with reference to the bank account of plaintiff in error.

VII.

That the court erred in the admission in evidence of the papers taken from the possession of the defendant O'Hagan. (Trans. pages 199-200.)

VIII.

That the court erred in admitting in evidence a letter written in a foreign language and translated. (Trans. pages 112-117.)

IX.

That the court erred in admitting in evidence the unsigned statements of defendants Daniels and Rodney. (Trans. pages 90-98.)

X.

That the court erred in refusing to give the instruction upon circumstantial evidence requested by plaintiff in error. (Trans. page 317.)

XI.

That the court erred in refusing to give instructions No. XXII, XXIII (Trans. pages 319-320) requested by plaintiff in error, relating to the alleged confession of plaintiff in error.

ARGUMENT.

I.

THERE IS A MATERIAL VARIANCE BETWEEN THE INDICTMENT AND THE EVIDENCE INTRODUCED BY THE TRIAL.

Plaintiff in error contends that by reason of a material variance between the indictment and the proof in support thereof, the Honorable District Court had no jurisdiction to pass judgment upon plaintiff in error as stated in paragraph II of the motion in arrest of judgment. (Trans. page 34.) If any crime has been committed, it was shown to have been committed outside of the Northern District of California.

The indictment alleges that the conspiracy was formed on or about the 1st day of February, 1924, at the Bay of San Francisco. A careful reading of all the testimony in this case will convince this honorable court that the only evidence relating to any occurrence in San Francisco Bay, relative to the particular conspiracy set forth in the indictment was the arrest of

Captain O'Hagan and the crew of the "Giulia", upon their arrival in the Bay of San Francisco. (Trans. pages 236-237.)

> "Venue of the charge of conspiracy cannot be inferred from the fact that defendant was arrested by Police Officers of a certain City where the overt act is charged to have been committed, but is not shown to have been committed within such City."
>
> *Jianole v. United States,* 229 Fed. 496.

Merely because these defendants were arrested in the Bay of San Francisco does not prove in any manner that a conspiracy to transport liquors into the United States was formed at the Bay of San Francisco, where said conspiracy, if there was one, existed from the time the "Giulia" sailed from Los Angeles to Havana, Cuba, and continued up to the time of such arrest.

We are unable to ascertain from the evidence in this case when or where this alleged conspiracy was formed. According to defendant O'Hagan, his first connection therewith was in April 1924, at the office of Guivan McMillan, at No. 17 Columbus Avenue, San Francisco. (Trans. page 231.) According to the alleged confession of the plaintiff in error, it was formed about the time that he, Campanelli, went to Miami, Florida, in company with Henderson and De Maria, two of the defendants in this case.

The law requires that the conspiracy must be proved to have been formed at the place alleged in the indictment.

U. S. v. Cole, 153 Fed. 801, 808, citing
Hyde v. Slime, 199 U. S. 76, 77.

We earnestly contend that this variance calls for a reversal of the judgment in this case. The judgment of conviction upon the indictment in this case certainly would not be a bar to a prosecution of any of these defendants for conspiracy to transport intoxicating liquors into the United States, at Los Angeles or Havana, Cuba, or any other place.

II.

THE COURT ERRED IN ADMITTING EVIDENCE RELATING TO THE OWNERSHIP OF THE SHIP "ARDENZA" AND THE "BLACK BOOK" OF THE DEFENDANT HENDERSON UPON THE TRIAL OF THIS CASE.

The court admitted in evidence the testimony of the witness George Michael MacNevin (Trans. pages 49-52) to the effect that he was acquainted with the defendants McMillan and Henderson during the year 1923, and up to March, 1924. In a conversation at sometime during that period Henderson claimed that he owned a cargo of liquors, which was then aboard the ship "Ardenza", which was at that time outside the Heads at San Francisco. Also that Henderson was possessed of a "Black Book", which Henderson said represented so many thousand cases of whiskey, and he had it there as coal. (Trans. page 52.)

This testimony is clearly not within the scope of the indictment in this case. The indictment charges a conspiracy occurring between February and October, 1924, to transport liquors into the United States, and the overt acts therein charged all refer to the activities of the defendants with reference to the steamship "Giulia".

The identical point was decided in the case of *Terry v. United States,* 7 Fed. (2d) 28. This court reversed the judgment therein upon the ground that testimony relating to another conspiracy was inadmissible, upon a charge similar to the one now before the court. In that case the indictment charged that the defendants conspired and confederated to land a large quantity of intoxicating liquors at Allen's Wharf in Monterey County. At the trial the court admitted testimony over an objection and exception, tending to prove that about six weeks prior to the incident at Allen's Wharf, the plaintiff in error, employed one Frohn to transport several barrels of intoxicating liquor from Bodega Bay to a ranch house in the vicinity of Petaluma. There was no testimony of any kind, direct or circumstantial, tending to connect any of the other defendants with this prior incident. Said Mr. Circuit Judge Rudkin, in the case of *Terry v. U. S.,* supra:

> "In ruling upon the admission of testimony, and in the charge to the jury, the court proceeded upon the theory that some of the defendants might be convicted of one conspiracy and some of another; that is, that the plaintiff in error and the defendant Zuker might be convicted of a conspiracy to transport, possess, or sell intoxicating liquor at Bodega Bay, and the remaining defendants of a conspiracy to transport, possess, or sell intoxicating liquor at Allen's Wharf, even though the two conspiracies and the parties thereto were entirely different. The rulings admit of no other construction.
>
> 'If, however, the charge of conspiracy in the indictment is merely that all the defendants had a similar general purpose in view, and that each of four groups of persons were co-operating without

any privity each with the other, and not towards the same common end, but toward separate ends similar in character, such a combination would not constitute a single conspiracy, but several conspiracies, which not only could not be joined in one count, but not even in one indictment'. United States v. M'Connell, (D. C.) 285 F. 164.

In other words, a conspiracy is not an omnibus charge, under which you can prove anything and everything, and convict of the sins of a lifetime. For these reasons the rulings complained of are erroneous and call for a reversal."

Terry v. U. S., 7 Fed. (2d) 28.

And said Mr. Circuit Judge Hunt, speaking for the court in *Crowley v. United States,* 8 Fed. (2) 118:

"It is not doubted at all that in a conspiracy case where the evidence tends to prove that the defendant and one or more persons have entered into a common scheme to commit a crime such as unlawfully to transport liquor, evidence of other like offenses, committed by defendant in carrying on common enterprise, is relevant as showing the knowledge or intent of the defendant. But in order to make such evidence admissible, there must be such a showing of connection between the different transactions as raises a fair inference of a common motive in each. Griffs v. United States, 158 Fed. 572, 85 C. C. A. 596. Here there was no ground for any such inference. The obvious effect of the evidence was highly prejudicial and requires a reversal of the judgment."

Admission of testimony as to transactions occurring before the conspiracy charged ever existed is error.

Cooper v. United States, 9 Fed. (2d) 210.

"The scope and purpose of testimony of similar offenses is limited and only in exceptional cases, is such proof admissible. And, when admissible,

it must be clear and convincing, and not merely proof of suspicious circumstances."

Gart v. United States, 294 Fed. 66.

The argument used by this court in the *Terry* case is as strong an argument as can be found in favor of our contention on this point. We fail to see how the trial court could find any connection between the defendants on trial and the activities of McMillan and Henderson, two defendants not on trial, in connection with another conspiracy to transport intoxicating liquors into the United States by means of the ship "Ardenza". If this is proper testimony in this case, every transportation of liquor into the United States from the time of the passage of the "National Prohibition Act" in which any person charged in this indictment had any possible connection, would be relevant and material evidence. In view of the decisions quoted above, we believe the above named error alone is sufficient to call for a reversal of the judgment in this case, upon the authority of *Terry v. United States* (supra).

III.

THE COURT ERRED IN ADMITTING TESTIMONY RELATIVE TO THE SEIZURE OF INTOXICATING LIQUORS FROM THE BOAT "MAE HEYMAN" AND THE ADMISSION IN EVIDENCE OF THE PAYMENT OF A BILL OF THE KING COAL CO. FOR THE DELIVERY OF COAL TO SAID BOAT.

This point brings up a discussion of specifications of error III and IV and V of this brief. The witness G. L. Lee testified (Trans. pages 46-49) that on the

10th of April, 1924, that the boat "Mae Heyman" landed at Pier 16 in San Francisco, loaded with 1705 sacks, which contained bottles of beer; that he in company with other Federal Officers seized the boat and liquor and arrested the men in charge of the said boat. None of these men arrested were defendants in this case. The witness Mrs. Juanita Bunzell Cohen testified that she was employed by the King Coal Company, and on December 5, 1923, the defendant Guivan McMillan paid a bill for coal to the King Coal Company, amounting to over $300.00. (Trans. pages 52-54.)

Later the Government introduced in evidence the bill in question, for delivery of coal to the "Mae Heyman". (Trans. page 200.) What we have said with reference to the admission of the testimony relating to the "Ardenza" applies with even more force to the testimony now being discussed. In the case of *Terry v. United States,* hereinbefore quoted, the evidence declared by the court to have been erroneously admitted related to a different transaction, occurring at a different time and place by two of the defendants charged in the indictment under consideration. Here we have evidence of an arrest made of different defendants, at a different time, who were bringing in liquor upon another boat than that mentioned in the indictment in this case. The only possible connection with the "Mae Heyman" affair and the alleged conspiracy, for which plaintiff in error was convicted, is that one of the defendants, not on trial, paid a bill for coal delivered to this boat more than two months

prior to the date charged in this indictment, to-wit: December 5, 1923. (Trans. p. 53.)

This appears to us to be an attempt upon the part of the Government to charge plaintiff in error and his co-defendants, who stood trial in this case, with every transaction, and every crime, that Henderson and McMillan ever committed within the jurisdiction of the trial court. Conceding that a conspiracy to land intoxicating liquors in San Francisco from the steamer "Giulia" was proven, any act relating to said conspiracy committed by MacMillan or Henderson may be relevant and material, but we fail to see the relevancy or the materiality of testimony of acts of these two men relating to another transaction and another conspiracy not mentioned in the indictment in this case.

In the case of *Crowley v. United States,* 8 Fed. (2d) 118, it was held that evidence showing arrest of defendant on a charge of transporting liquor several months before, at a place eighty miles distant was inadmissible. The court in that case says:

> "It does not appear to have any relation whatever to the charge of conspiracy for which defendant and his co-defendants were on trial. It did not tend to show that he had acted in combination with anyone named in the conspiracy charged or that his possession of liquor at that time was part of a plan to violate the Prohibition Law at subsequent times, or that in any way it was connected with the offense under consideration. It was wholly collateral to the issue on trial as to place, time and circumstances and the evidence of it should not have been introduced."

If the defendants, McMillan or Henderson, or either of them, had been arrested for conspiracy with reference to the "Mae Heyman" affair, then such testimony would be irrelevant as far as the other defendants are concerned, even though the defendants McMillan and Henderson were personally present at the trial. The court in ruling upon the evidence relating to the purchase of the coal for the boat "Mae Heyman" (Trans. pages 139-140) stated that the evidence was competent as against McMillan and Henderson, but not as against the other defendants. McMillan and Henderson were not on trial. How could testimony, competent as to them only, be introduced in this case? We cannot help but feel that the introduction of this testimony, only relevant as against two absent defendants, was introduced for the purpose of prejudicing the jury against those defendants who actually stood trial.

Later, the court, upon motion of the United States Attorney, admitted this testimony as against all defendants. (Trans. page 200.) In doing so, the court committed the identical error which was expressly condemned in the cases of *United States v. Terry* and *United States v. Crowley,* already cited.

IV.

THE COURT ERRED IN ADMITTING TESTIMONY WITH REFERENCE TO THE BANK ACCOUNT OF PLAINTIFF IN ERROR.

The court, over the objection and exception of plaintiff in error, admitted the testimony of Plinio Com-

pana, who testified that he was manager of the Mercantile Trust Company, at its Broadway and Grant Avenue office, and that plaintiff in error had an account in said bank, commencing July 21, 1923, which showed deposits amounting to $157,611.02. The statement of this account was introduced in evidence. (Trans. pages 195-199.) The purpose of this testimony was evidently to show that plaintiff in error was engaged in illicit liquor transactions prior, during and subsequent to the times alleged in the indictment in this case. What we have said with reference to other offenses in reference to the "Ardenza" matter and the "Mae Heyman" affair apply also to this testimony.

> "Testimony to show or tending to show defendant's commission of crimes independent of that for which he is on trial is inadmissible."
>
> *Smith v. United States,* 10 Fed. (2d) 787.

> "Evidence of payment of money in April is inadmissible in a prosecution for a conspiracy ending in March, 1926."
>
> *Giordano v. United States,* 9 Fed. (2d) 830.

Generally evidence which shows, or tends to show, that the accused has committed another offense wholly independent of that for which he is being tried, even though it is a crime of the same character, is irrelevant and inadmissible.

Thompson v. United States, 283 Fed. 895,

Citing *Boyd v. United States,* 142 U. S. 450, and *Fish v. United States,* 215 Fed. 544.

In the case of *Heitman v. United States,* 5 Fed. (2d) 887, Mr. Circuit Judge Hunt, speaking for the court, says:

"The obvious purpose of the prosecution in introducing such evidence was to impress the jury with the belief that defendant, at some previous time, at another place, was implicated in an attempt to violate the prohibition law. The matter was wholly apart from the issue to be tried, and the tendency of it was to take the minds of the jurors away from the material questions before them, and to give the impression that defendant, by reason of previous criminal acts, was unworthy and therefore probably guilty of the charge upon which he was being tried. It was clear error to allow the evidence to go to the jury. Jianole v. United States (C. C. A.), 299, F. 496; Beyer v. United States, (C. C. A.) 282 F. 225; Souza v. United States, 5 F. (2d) 9, April 27, 1925."

It is further contended that the proper foundation was not laid for the admission of this account in evidence. It nowhere appears in the evidence of this witness (Trans. pages 195-199) that this account was authentic or correct.

Books of account will be rejected unless the requisite foundation in proof of their character, authenticity, correctness and regularity is laid for their introduction in evidence.

17 *Cyc.* 368.

V.

THE COURT ERRED IN THE ADMISSION IN EVIDENCE OF PAPERS TAKEN FROM THE POSSESSION OF DEFENDANT O'HAGAN.

At the time of the arrest of the defendant O'Hagan, the officers took from his possession certain papers, including the registry of the boat "Giulia" and other

papers which were introduced in evidence, and the jury were instructed by the court to consider them as evidence against the defendant O'Hagan only. (Trans. pages 199-200.) This brings us to the consideration of our Specifications of Error Nos. VII and VIII.

A letter written in Italian was found in the possession of the defendant O'Hagan. This letter was addressed to plaintiff in error; but was unsigned. The translation of this letter was read in evidence. (Trans. pages 112-117.) Subsequently this letter, with its translation, was withdrawn. (Trans. pages 200-201.) An account book, found in the possession of the defendant, O'Hagan, was also read to the jury. (Trans. pages 100-101.)

All these papers were evidently considered by the jury as evidence in this case as against all of the defendants, even though the court had limited the consideration of this testimony to only one of the defendants, and even though one of these papers was withdrawn from the consideration of the jury. It is difficult to erase the impression made upon the minds of the jury at the time of the introduction of these papers, and the reading of them to the jury, by a subsequent withdrawal of the same. The effect of this action of the Government and of the court is highly prejudicial to the rights of plaintiff in error inasmuch as the letter read was addressed to plaintiff in error and tends to show his connection with the steamship "Giulia" and her cargo, and his interest therein. (Trans. pages 112-117.)

Several of these papers were written or printed in a foreign language and were not translated. (Trans. pages 57-60.) We refer particularly to the manifest (Trans. pages 86-87) and the two documents introduced as U. S. Exhibit No. 3 (Trans. pages 57-59) which latter do not appear in the record but was referred to by the United States Attorney.

There can be no doubt that defendants were prejudiced by the admission of this evidence. They were not signed by any of the defendants. They were not translated and therefore should not have been allowed to be considered by the jury for any purpose.

VI.

THE COURT ERRED IN ADMITTING THE UNSIGNED STATEMENTS OF DEFENDANTS DANIELS AND RODNEY.

The statements made by the defendants Daniels and Rodney to the Federal Officers at the time of their arrest (Trans. pages 90-98) were admitted in evidence over the objection and exception of plaintiff in error. They were made after the conspiracy had ended, and were not declarations of co-conspirators by reason of the fact that these two defendants were acquitted by the verdict of the jury in this case. If they were acquitted they were not co-conspirators and these statements were hearsay, and consequently inadmissible. These statements connect plaintiff in error with the offense alleged in the indictment. The defendants who made these statements did not take the witness stand. Plaintiff in error had no opportunity

to cross-examine them. The statements were not made under oath and consequently were highly prejudicial to him.

VII.

THE COURT ERRED IN REFUSING TO GIVE REQUESTED INSTRUCTION UPON CIRCUMSTANTIAL EVIDENCE.

Plaintiff in error, requested the court to give an instruction upon circumstantial evidence. This instruction is designated as No. XVII. (Trans. page 317.) This instruction we believe correctly states the law upon this subject. The court in its own intruction (Trans. page 251) states "It is not necessary, however, for the Government to prove that such parties met together and entered into an explicit or formal agreement to that effect, or that they directly, by word or in writing, stated what the unlawful scheme was to be, or the details of the plan or means by which it is to be made effective." Further (Trans. page 252) the court says:

> "While the conspiracy may be proven by circumstantial evidence, yet the circumstances relied on for the proof must be such as to show that there was a common agreement or understanding, and the mere fact that two or more persons on different occasions did acts of similar nature, looking toward the same end, or result, would not constitute, as a matter of law, a conspiracy, unless there was a common design and intention."

These are the only instructions that we can find upon the subject. The instruction requested by plaintiff in error calls attention to the degree of proof required to

convict the accused, and states particularly, "The circumstances in the proof must be so strong as to exclude any other reasonable hypothesis except the single one of guilt."

In the case of *Terry v. United States,* 7 Fed. (2d) 28, this court held, that an instruction to the effect that if acts of the parties were committed in the manner or under circumstances which, by reason of their situation and conditions surrounding them, give rise to a reasonable and just inference that they were the result of a previous agreement, the jury could find the existence of a conspiracy to do those acts, was error in view of the presumption of innocence of the accused until proven guilty.

It is contended that if the giving of such an instruction constituted error, the failure of the court to give any instruction properly defining circumstantial evidence and the degree of proof required by such evidence, certainly constituted an error requiring a reversal of the judgment in this case.

VIII.

THE COURT ERRED IN REFUSING TO GIVE REQUESTED INSTRUCTIONS WITH REFERENCE TO THE ALLEGED CONFESSION OF PLAINTIFF IN ERROR.

In the testimony of Alf Oftedal, called as a witness for the Government, we find the written statement signed by plaintiff in error. (Trans. pages 148-153.) The witness further testifies that plaintiff in error made a second statement, which was reduced to writ-

ing, but which plaintiff in error refused to sign, but which was related by the witness to the jury, using the unsigned statement to refresh his memory. (Trans. pages 154-172.) Witness Oftedal testifies that these statements were made freely and voluntarily; that no threats, or promises or inducements of any kind were made. (Trans. pages 142, 146 and 173.) Upon cross-examination this witness testified that (Trans. page 146) before the first statement was made the bond of plaintiff in error had been fixed at $10,000.00; that the bond was subsequently reduced to $2500.00, which was furnished by plaintiff in error. He also testified that he had asked the witness Guido Braccini to locate plaintiff in error and bring him into his office. (Trans. page 165.)

Braccini testified (Trans. page 211) that after plaintiff in error visited the witness, at his own home, he, the witness, went to the office of Mr. Oftedal, and then afterwards brought plaintiff in error to the said office after first arranging with Mr. Oftedal for the reduction of the bail of plaintiff in error. (Trans. pages 212-213.) He further testified:

> "Mr. Oftedal agreed that he thought himself that Campanelli did not have the brains or finances to do anything like that, and told me that the Government looked favorably upon any minor defendant who would come and tell the whole truth, that generally in a case like that, where these minor defendants are of great help to the Government, generally the District Attorney's office is informed of the case, and the case is presented to the presiding Judge, but in any case the Judge is the one that has the final decision." (Trans. page 215.)

He further testified:

> "I said to Mr. Oftedal, 'Now, does this case look real bad?' And he did not answer anything, and I said, 'Now, this fellow, what shall I do with him? Do you want him to plead guilty, or has he got any line of defense?' Oftedal said he might plead guilty, and he might refer the matter to the District Attorney and the District Attorney might turn it over to the presiding Judge, or arrange leniency in his case, and then I suggested in that case probably, I said, he would come out with a fine, a nominal sum of money, probably $300, and Oftedal said nothing; I thought that was the silent understanding.
>
> Q. You conveyed that information, did you, Mr. Braccini, to Mr. Campanelli?
>
> A. On my own initiative I said to Campanelli, 'The best thing you can do it to plead guilty.' " (Trans. page 221.)

The testimony quoted is only a portion of the testimony which we believe tends to show that there existed in the mind of plaintiff in error a belief that if he would make statements with reference to the matters charged in the indictment in this case, that leniency would be shown him. Careful reading of the cross-examination of witness Oftedal and the entire testimony of witness Braccini show that the statements made by the plaintiff in error were not entirely free and voluntary.

Considering the relationship between the witness Braccini and Oftedal and between Braccini and plaintiff in error, the fact that the bail was actually reduced, the fact that the statements of Oftedal were repeated by Braccini to plaintiff in error, it is clear that there was a conflict in the evidence as to

whether or not the statements made by plaintiff in error were freely and voluntarily given.

Plaintiff in error requested the instructions Nos. XXII, XXIII, and XXIV to be given to the jury. These instructions are as follows:

> "XXII. I instruct you that you are the sole judge of whether any alleged statement made by the defendant Guiseppi Campanelli to Alf Oftedahl, or to any other Government agent, was made freely and voluntarily, and made without promise of immunity or other consideration, and made after he was fully advised of his rights, and made after he was warned that anything he might then say could later be used against him." (Trans. page 319.)

> "XXIII. In determining whether or not the statement of the defendant Guiseppe Campanelli was free and voluntary, you are entitled to take into consideration the fact that he was brought to the Government agents by a Government representative who afterwards promised him that if he would make a second statement the Government agents would see that he received only a fine and that when he refused to sign said second statement he was arrested late at night and placed under high bail although he was already under bond in this case." (Trans. page 319.)

> "XXIV. If you find from the evidence that any alleged statement made by the defendant Guiseppe Campanelli to Alf Oftedahl, or to any other Government agent, was not made freely and voluntarily, after the defendant was fully advised of his rights and warned that anything he might then say might later be used against him, and was not made without promise of immunity or other consideration, then I instruct you that you must disregard such statement." (Trans. page 320.)

"Where evidence is offered tending to show that a written confession was voluntarily made by accused, that it was reduced to writing in his presence and read and signed by him, such written confession is admissible in evidence, and the questions whether it was voluntarily made, when submitted by the court upon conflicting evidence, and whether it truthfully recites the statements made by the accused, and reduced to writing in his presence, are questions for the jury."

McBryde v. United States, 7 Fed. (2d) 466;
Wan v. United States, 45 Sup. Ct. Rep. 1;
McCool v. United States, 263 Fed. 55;
Murray v. United States, 288 Fed. 1008;
Shaw v. United States, 180 Fed. 348.

"Where there is a conflict of evidence as to whether a confession is or is not voluntary, if the court decides that it is admissible the question may be left to the jury with the direction that they should reject the confession if upon the whole evidence they are satisfied it was not the voluntary act of the defendant. In such circumstances the defendant would have no cause for complaint since the confession would be rejected if the jury disagreed with the court, defendant would be in no worse position than if no submission had been made."

Perrygo v. United States, 2 Fed. (2d) 181.

"In the Federal Courts, the requisite of voluntariness is not satisfied by establishing merely that the confession was not induced by a promise or a threat. A confession is voluntary in law if, and only if, it was in fact voluntarily made."

Wan v. United States, 266 U. S. 1.

From the foregoing authorities, we conclude that where there is conflict in the evidence as to the voluntariness of the alleged confession, the jury are the exclusive judges as to whether or not the statement made was voluntary, or not voluntary, and it is the duty of the court to instruct them that they should disregard such alleged confession if they find as a fact that it was not voluntarily made.

Considering the circumstances surrounding the making of the alleged statements by plaintiff in error, he certainly had the right to have the jury instructed particularly upon the matters pointed out in his requested instructions and not be bound by one instruction covering all statements made by all defendants.

We believe that plaintiff in error was entitled to have the above instructions given.

CONCLUSION.

For the foregoing reasons it is respectfully submitted that the said plaintiff in error did not have a fair trial and was not legally convicted, and that the judgment of conviction in said United States District Court should be reversed.

Dated, San Francisco,
May 22, 1926.

WILFORD H. TULLY,
Attorney for Plaintiff in Error.

No. 4568

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

GIUSEPPI CAMPANELLI,
Plaintiff in Error,

vs.

UNITED STATES OF AMERICA,
Defendant in Error.

BRIEF FOR DEFENDANT IN ERROR.

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BRIEF FOR DEFENDANT IN ERROR.

STATEMENT.

Plaintiff in error, Giuseppi Campanelli, prosecutes a writ of error to the District Court of the Northern District of California to reverse his sentence rendered upon his conviction of the crime of conspiracy under Section 37 of the Criminal Code of the United States.

On November 12, 1924, an indictment was presented against plaintiff in error and twenty-three other persons named, charging them with the crime of conspiracy in that at the Bay of San Francisco, within the District and Division aforesaid, and within the jurisdiction of that court, they did, on the 1st

day of February, 1924, unlawfully, feloniously and knowingly conspire among themselves and with others unknown to commit offenses against the United States; that is to say,

> "(a) Wilfully, unlawfully, feloniously and knowingly to sell, transport, import, deliver, furnish and possess in the United States intoxicating liquor for beverage purposes, to wit, whiskey, wine, champagne, gin and beer containing one-half of one per centum and more of alcohol by volume and fit for use and intended for use for beverage purposes in the United States and within the jurisdiction of this court the said Acts to be then and there unlawful and prohibited and contrary to the provisions of the Act of October 28, 1919, known as the 'National Prohibition Act' and intended for use for beverage purposes in violation of said Act.
>
> (b) Wilfully, unlawfully, feloniously, knowingly and fraudulently import and bring into the United States and within the jurisdiction of this court, assist in importing and bringing into the United States and within the jurisdiction of this court merchandise contrary to law, to wit, whiskey, champagne, wine, gin and beer containing one-half of one per centum and more of alcohol by volume and fit for use and intended for use for beverage purposes within the United States, the said acts to be then and there unlawful and prohibited and contrary to the provisions of Section 593, Subdivision (b) of the Tariff Act of 1922 and intended to be imported and brought into the said United States in violation of said Act."

It was alleged that the said parties conspired with divers other persons whose names were to the Grand Jurors unknown, and it is charged that the conspiracy

was in effect continuously throughout all of the time and from and after about February 1, 1924, up to the filing of the indictment and particularly at the time of the commission of overt acts set forth.

As overt acts in aid of the conspiracy it was charged:

(a) that the defendants and each of them did at Havana, Cuba, in July, 1924, cause the Steamer "Giulia" to be loaded with about 12,000 cases of intoxicating liquor specified, and that on the 7th of July, they caused the steamer to leave the Port of Havana, Cuba, and proceed to a point opposite and within a distance of less than thirty miles from the Farallone Islands, with a purpose and intent of introducing the liquor into the United States, and that they furnished and delivered from said vessel at said last mentioned point a portion of the cargo of intoxicating liquors to and upon the Motorboat "Gnat" and divers other motorboats whose names and masters were to the Grand Jury unknown, well knowing that the motorboat would deliver, import and bring into the United States, to wit, San Francisco Bay, said cargo;

(b) that the defendants and each of them on September 1, 1924, and while the Steamer "Giulia" was at anchor opposite the Farallone Islands, did load upon, deliver and furnish to the motorboat "Gnat" from the Steamer "Giulia" 300 cases of whiskey, and that the defendants did thereupon cause said liquor to be transported and caused to be brought

into the United States and into San Francsico Bay and within the jurisdiction of the court on the motorboat "Gnat".

(c) that the defendants and each of them, between September 8, 1924, and October 8, 1924, while the said Steamer "Giulia" was at anchor as aforesaid, loaded upon, delivered and furnished to the motorboat "Shark" and the motorboat "Gnat" 3000 cases of specified intoxicating liquor, and that the said defendants and each of them during said time by means of said motorboats, transported, imported and brought into the United States, into San Francisco Bay, and within the jurisdiction of the court said intoxicating liquor.

Certain of the defendants were not apprehended or brought to trial; a number, who constituted the crew of the Steamer "Giulia" were acquitted; the defendant John De Maria, was also acquitted, while the master of the "Giulia", J. O'Hagan, was convicted, and plaintiff in error, Giuseppi Campanelli, was convicted and upon such conviction sentenced to be imprisoned for two years in the United States Penitentiary and to pay a fine of $500.

There is a bill of exceptions in the record of some volume. Although it includes a number of papers not necessary to be so included (R. 268), we are unable to find therein any statement that it includes all of the evidence submitted at the trial, nor is there any stipulation or reference to the written exhibits,

being therein included or sent to this court, with few exceptions.

Although the argument of plaintiff in error involves a consideration of the case made against him, we do not find in his brief any *statement* of the evidence, except a meager reference to a portion of it on pages 3 and 4 of his brief. Accordingly, we are constrained to submit a statement of the evidence of the case, and we shall attempt the plan of summarizing it rather than in setting forth *in extenso* in the words of the witness. Such summary, of course, need not include matters affecting other defendants only; it need only go far enough to show an agreement or combination between two or more of the charged defendants, including plaintiff in error, to "import", "possess", "transport", "deliver", and "sell" within the United States intoxicating liquor.

In the spring of 1923 defendant David Henderson and defendant Guyvan McMillan were acquainted and associated together appearing frequently at the office of the Columbo Mining Company (R. 49). These parties were two of the main conspirators in the combination under review. They were acquainted and associating with one Manning. Manning made plaintiff in error Campanelli acquainted with Henderson (R. 148), and Henderson made Campanelli acquainted with McMillan (R. 149). At Henderson's invitation Campanelli visited him at the Stanford Court Apartments (R. 148). This introduction was in the spring of 1923 at the mine syndicate office at 625

Market Street (R. 159). McMillan acted as a sort of confidential agent or representative of Henderson. Upon being invited to Henderson's apartments, plaintiff in error got better acquainted with him (R. 159), and thereupon entered into an arrangement whereby Henderson entrusted him with sums of money and he was to receive an award for each and every case delivered from these certain ships, the *"Ardenza"* and the *"Frontiersman"*, whether he, Campanelli, took part in the sales or not; that his principal duty was to appear at the point of delivery, collect the money due in payment for the liquor, and sometimes at Henderson's suggestion he deposited such money to his own bank account, at other times he would proceed to the Stanford Court Apartments or to his own office and make settlements with Henderson as the result of these liquor sales (R. 160). As a part of this arrangement Campanelli had with Henderson he was to receive so much for each and every case delivered by the Henderson interests in California or in San Francisco, and that his principal duty in that connection was to keep in contact with the shore boats that went out to the ship to get the liquor and then to be at the point of delivery when a cargo was delivered at any particular residence. He would accompany the truck that made the delivery and then he would collect from the purchaser and he deposited these funds in the bank or gave them direct to Mr. Henderson, either way. Sometimes he said he carried large amounts of money for Henderson for days at a time and then Henderson would arrange with him,

every so often, to figure out how much was due as the result of the quantity unloaded on the ship *"Ardenza"*, as well as the *"Frontiersman"* and the *"Giulia"*. However, as far as the *"Giulia"* was concerned, only two boat loads had been delivered prior to the time the boat was sunk and that Campanelli received his commission from these two deliveries (R. 155). On one occasion described as twenty days or more after leaving Havana, hereinafter referred to, Campanelli, being in his own office at 17 Columbus Avenue, in this city, received a call from Henderson in the city, asking him to join the latter at the Clift Hotel on Geary Street. At that time Henderson told Campanelli there were about 8500 cases of liquor aboard the "Giulia" and assistance was desired in the matter of the disposition of the cargo. Henderson offered to pay him a dollar a case as commission for such assistance, as he had rendered or might render in the future (R. 161). Henderson told Campanelli that one Alioto, foreman for the Booth Fishing Company at San Francisco, who had assisted in unloading liquors on a previous occasion would help him in transferring cargoes from the "Giulia" to points along the shore and Campanelli was requested to get in touch with Alioto to arrange certain details with him, and that he was authorized to tell Alioto that it was Henderson's purpose to pay him at the rate of $2.50 for each case of liquor unloaded from the "Giulia"; that Alioto agreed to do the work and Campanelli informed him of the date when Hender-

son expected that the boat would arrive off the coast, the boat "Giulia" (R. 162).

The foregoing matters were derived from the testimony of Special Agent Oftedal as to conversations had with Campanelli in November and December, 1924.

In April or May, 1924, defendant Campanelli and McMillan conducted negotiations resulting in the sale to McMillan of the ship *"Frontiersman"*, owned by four persons named. The first payment of $300 was paid by McMillan March 12, 1924; the second payment of $500 was made by Western Union Money Order March 13th; the third payment was a check for $4500 on a San Francisco bank dated March 21, signed G. Campanelli; the fourth was $5000 on a San Francisco bank, signed Campanelli. McMillan negotiated the purchase; he was present in the room when the $4500 signed by Campanelli was made out and also the $5000. The owners assigned their interest in the boat to McMillan and Campanelli—a joint assignment. Negotiations for the purchase of the vessel began March 12, 1924, and the deal was consummated April 17, 1924 (R. 119). The name of the steamer so purchased was subsequently altered from "Frontiersman" to "Giulia" (R. 86).

The exhibits apparently pertaining to this vessel, some of them introduced by the defendant Campanelli (R. 205, 206), are not in the record, nor sent up as exhibits with, perhaps, the single exceptions of the certificate of registry (R. 86, 87), and the manifest (R. 73).

Defendant O'Hagan testified that he was a ship master; that before April, 1924, he had been working for the Associated Oil Company, then left San Pedro and came to San Francisco, inquired of the British Consulate if there were any British ships in port requiring a master and he was referred by the consul to McMillan, who recently purchased a ship. He went to the address given him, 17 Columbus Avenue, and there met McMillan who told him he intended to send a cargo of canned goods from San Francisco to Havana; that his ship was at the Los Angeles Dry Dock and he asked Captain O'Hagan to go down and inspect the vessel. On April 29th witness left and went to Los Angeles; McMillan arrived ten or eleven days afterwards. Repairs were then being made. McMillan hired the crew and brought them to Los Angeles. The ship was called the "Giulia". The vessel left Los Angeles Harbor May 24th, went to Panama City for the purpose of procuring a provisional Panamanian Registry. It would have taken several months to procure British Registry; for that reason it was registered under the flag of Panama with McMillan appearing as owner. Witness identifies the document offered in evidence as the registration of the ship under the Panamanian flag. The vessel proceeded to Cuba where witness was advised for the first time that a cargo of liquor was to be loaded on the vessel. Witness identifies a copy of the bill of lading as to the contents of the cargo already in evidence, referring apparently to R. 75, which in turn referred to the manifest apparently set out at R. 73. Witness

stated that the following clause was inserted at his insistence:

> "Consignees will have option, weather permitting to take delivery on the high seas, but in no case and under no circumstances is delivery to be made within 20 miles of any territory, and then only on the Pacific Coast within a radius of a line drawn due west of San Diego and a line due west of Seattle, always at least 25 miles from such described coasts or territories. All island territories within this described area to be taken as the measurement point for such deliveries, if made, in order to conform with a recent treaty made between Great Britain and the United States of America. Also, should the maximum speed of any vessel taking delivery be more than 15 knots per hour, such excess speed must be added to the delivery distance from the within described area."

Thereupon witness with the vessel sailed from Havana to Vancouver, British Columbia, as destination but was told in Havana that a supercargo on board would give definite instructions at Mazatlan. Owing to a fire in the vessel at Mazatlan and bad weather up the coast, there was delay so that when the ship arrived about thirty miles west of Half Moon Bay the coal was exhausted and food running short. Witness was compelled to run back under sail to Ensenada, on the way hailing a small boat. He sent a cablegram to Mr. McMillan, 17 Columbus Avenue, he being the only man recognized as owner and his name appearing on the documents in witness' possession as owner. The cable was sent from Ensenada by the purser and Campanelli arrived in

Ensenada. Negotiations were had and witness received about 700 sacks of coal from the Steamer "Gryme", just sufficient to get back to the Farallones. When witness arrived no boat was evident but eventually witness received thirty or forty sacks of coal. He made delivery of cargo on the high seas to two boats. The first boat that came along side delivered coal, witness doesn't recall whether it took up liquor. The purser or supercargo left the boat as soon as the coal was delivered and returned on the boat that brought out the coal. Subsequently coal was received from a boat—the "Shark"—in the vicinity of Point Reyes (R. 234). This was within the limits of the United States (R. 243). After so coaling witness proceeded to a point 25 or 30 miles west of the Farallones. That was the last coal received. Some water was received from the "Shark" and a small quantity of provisions, about twenty-five or six days before abandoning the ship. On October 24, 1924, witness abandoned the ship, his coal was gone, it was about six weeks after receiving coal from the "Shark", had no provisions, water was muddy and dirty, had no physician or doctor, crew wanted to abandon ship earlier. The ship had drifted and finally was abandoned nineteen miles west of Point Esteros (R. 236). The seacocks were opened and the vessel sunk to avoid being a menace to navigation. Five hours later the party, including witness and crew, were picked up by the Steamer "Brookings" and brought into San Francisco. Witness was employed by McMillan at a salary of $240 a month.

Had not been paid. On cross-examination witness said he met McMillan at 17 Columbus Avenue, met Campanelli at the same address in McMillan's Company. Campanelli did not give witness the impression that he had any interest in the ship but was merely acting under instructions from McMillan. Campanelli and McMillan appeared in Los Angeles when witness went to look at the boat. Campanelli left before we sailed; McMillan remained there until we sailed. When witness got to Havana he saw Henderson and Campanelli. McMillan was not there. McMillan told witness he was to take instructions from Campanelli. When witness saw Henderson he was in absolute charge of the loading. Campanelli informed me that Henderson was the boss (R. 241). Campanelli remained at Havana until after the ship left (R. 243). Saw Campanelli at Ensenada (R. 243). He came back with us on the boat to San Francisco. The first vessel brought out the coal. No coal came later. Gervaudo (the supercargo) left on the first boat; Campanelli left also. About six or seven loads of cargo were removed from the vessel under Henderson's instructions. Henderson came out there and remained on board for a time. Witness had aboard four rifles, a quantity of revolvers and a machine gun. McMillan sent them down to the vessel before we left San Pedro. They were eventually thrown overboard (R. 244). I followed the direction of Henderson at Havana because Campanelli told me he was the boss (R. 245).

Continuing as to Campanelli's statement, he said (R. 160):

That early in the year 1924, Henderson informed him of his plans for making a trip to Havana, Cuba, for the purpose of obtaining some liquor. He was advised of the fact that the Steamer "Giulia", would make the trip to Havana for the purpose of loading up liquor to bring around to California. That they started on the trip in the month of April, 1924, Campanelli went along on the train in the company of Henderson and De Maria. The parties spent a week in Miami and then proceeded to Havana via Steamer "Key West", Campanelli stayed in Havana for fifteen or twenty days. During that time he had frequent visits with Henderson who showed him certain warehouses there in which Henderson kept a supply of liquor that had been transferred from Scotland. That while there the "Giulia" arrived. Campanelli helped Henderson in loading the ship with about 8400 cases of intoxicating liquor from the warehouse on San Francisco Pier. De Maria did not remain in Havana very long, perhaps, a week. Campanelli stayed in Havana until the "Giulia" had loaded then proceeded to New Orleans; then returned to San Francisco by rail and about twenty days or more after leaving Havana, Campanelli, at his own office, 17 Columbus Avenue, in this city, received a telephone call from Henderson asking him to join the latter at the Clift Hotel. Meeting him he was told there was about 8500 cases of liquor upon the "Giulia" and assistance was desired as above stated

(R. 161). About a week later Henderson informed Campanelli that the "Giulia" was down at Ensenada in need of coal and provisions and requesting that he go down there and help supply the ship. Campanelli went to Ensenada and assisted (R. 162). Campanelli saw there the captain and supercargo Girvando (R. 163). A few days later the "Giulia" started on the voyage north, Campanelli aboard her. About thirty miles south of the Farallones he was permitted to go aboard in the first boat that came along side, he doesn't know the name, as far as he knows the launch did not remove any liquor. Arriving aboard he went to his own office on Columbus Avenue and found Henderson awaiting who told him that a load of liquor consisting of about 300 cases had been brought ashore from the "Giulia". At Henderson's direction Campanelli made one trip out to the "Giulia" by means of the launch "Gnat", transferring some provisions to the ship. Guyvan McMillan arranged for supplying the "Giulia" with coal. No liquor was brought in on the "Gnat" while Campanelli was aboard on the first trip. He later learned from Henderson that three loads of liquor were removed from the "Giulia" by means of the "Gnat" which was operated by Alioto. Campanelli states that he did not take part in the removing of any liquor from the "Giulia" nor in the disposition of it about the city (R. 164).

Henderson disappeared promptly after press office story of the sinking of the "Giulia" and the arrested crew (R. 164).

Ignacio Alioto testified that he knew defendant Campanelli; saw him September 13th or 14th, 1924; conversed with him. On the 8th or 10th of September, Campanelli hired witness' boat called the "Gnat" to bring provisions to a big boat outside. Nothing was said about bringing in liquor. A few days afterwards witness found that they had used the boat to bring in liquor and witness told him to use it for liquor. Witness never went out on the boat but received $2500 on account of bringing in liquor, was supposed to receive $3 a case. He received money from Campanelli but he still owes witness $2000 (R. 121). $2500 in money witness received he gave to men on the boat. That is, witness paid the two men $1600 of the $2500 received and kept the balance (R. 124).

Pablo Herman testified that he was the captain of the "Gnat" in September, 1924, working for Alioto, witness who just left the stand. I took some provisions out on the boat about two hours outside the Farallones to a boat called the "Giulia" and saw Captain O'Hagan of the "Giulia". I also took 150 sacks of coal out to the "Giulia" at approximately the same time and place. Witness brought liquor in three times; between 400 or 500 cases each load. Had a deck hand with him. Campanelli went out on the first trip (R. 124).

Witness Salvatore Alioto was a fisherman. In September, 1924, he was working for Ignacio Alioto on the "Gnat". Went with Captain Herman along side the "Giulia" west of Noonday Rock, along side

the Farallones. Witness knew defendant Campanelli; met him aboard the "Giulia". Campanelli went out on the "Gnat" but did not come back; was left on the "Giulia". Witness brought back whiskey from the "Giulia"; on three trips brought whiskey. Alioto paid witness to bring liquor in—$1500 (R. 128).

Frank Landl was working on a small boat—Number 3569. Went out to the "Giulia" near Noonday Rock. Recognized Captain O'Hagan as being the captain of the boat. Witness was paid by one Lenhart. Witness brought back a load of liquor from the "Giulia", approximately about four loads with 300 cases to the load. On one occasion witness saw defendant Campanelli on the "Giulia". Part of the liquor was landed on Lanatong Bay and the rest above Pt. Bonita. Witness saw Henderson. He made a trip with witness to the "Giulia" (R. 133, 134).

M. G. Sturdevant testified that in September, 1924, he was master of the motorboat "Shark". On the 15th of September, 1924, he took 75 tons of coal out to the boat "Giulia" in the motorboat "Shark". The "Giulia" was near Cordell Banks. Did not deliver the coal to the "Giulia" because it was too rough. They came into Drakes Bay. Witness delivered coal to the "Giulia" approximately a mile from shore, but the point runs down. He might have been between five or six yards from Pt. Reyes. The coal was obtained in Oakland. No liquor was brought in. Witness received full payment with the exception of $78. He is not sure whether he received the money from

Adolph or Mac. Witness went up to 15 or 17 Columbus Avenue with reference to the payment (R. 125, 126).

It is further shown by witnesses THOMPSON (R. 127), BEERMAKER (R. 134), and RICHARDSON (R. 135), that coal was delivered on the "Gryme" to the "Guilia" at Ensenada in September, 1924. The coal being arranged for with witnesses by De Maria, was taken from San Diego to Ensenada.

It was further shown that coal was sold and delivered to the Steamer "Mae Heyman" December 5, 1923 purchased by defendants McMillan and Henderson (R. 136, et seq. and R. 52). It was delivered to that vessel. It was further shown that on April 10, 1924, the "Mae Heyman" was seized at the end of the 16th Street Pier in this city while unloading cargo of 1705 cases of liquor and the men arrested (R. 47). It was in pint bottles with a heavy wrapper around it and then in regular sacks sewed tight on the end just like smuggled Scotch would come in, the same way (R. 48).

Witness COMPANA, manager of the Broadway and Grant Office of the Mercantile Trust Company, produced the bank statement of the plaintiff in error covering a period from July 21, 1923, to August 28, 1924 (R. 195). It was a complete record "of the man's account at the bank from the date it was opened to the date it was closed" (R. 196). It was put in evidence and showed a total of deposits of $157,-611.02. It was admitted as U. S. Ex. "10" but does

not further appear in the record. Witness is the manager. He knew the account was there and checked up the checks that came in and out (R. 197). Everything in the bank is directly under witness' supervision and the books are kept under him (R. 199). And defendant O'Hagan testifying completely corroborated the greater portion of the government's case. He freely admitted being employed by Henderson taking the ship "Giulia" from Los Angeles through the Canal to Havana, its loading with the liquors under the bill of lading containing the ambiguous clause hereinabove set forth, his seeing Campanelli at Havana, as well as subsequently at Ensenada, the arrival of the "Giulia" opposite San Francisco and delivery of liquor to small boats (R. 234). He admitted taking coal from the "Shark" within the territorial waters of the United States (R. 243). He further testified to the activities of Campanelli at Havana and Ensenada and to his travelling on the ship from Ensenada to a point off the Heads (R. 243).

The specifications of error are eleven in number and set forth:

(1) That there was a material variance between the indictment and the evidence;

(2) That the court erred in admitting evidence; and

(3) That the court erred in refusing to give certain instructions requested by plaintiff in error.

In the argument of counsel eight propositions are advanced in separate sections of his brief:

(1) That there is a variance between the indictment and the evidence;

(2) That the court erred in admitting evidence relating to the ship "Ardenza";

(3) That the court erred in admitting evidence in respect of the boat "Mae Heyman";

(4) That the court erred in receiving in evidence the bank account of plaintiff in error;

(5) That the court erred in admitting in evidence certain papers taken from the possession of defendant O'Hagan;

(6) That the court erred in admitting the statement of defendants Daniel and Rodney;

(7) That the court erred in refusing a requested instruction upon circumstantial evidence, and

(8) That the court erred in refusing to give certain instructions in regard to the confession of plaintiff in error.

ARGUMENT.

I.

THERE WAS NO VARIANCE BETWEEN THE PLEADING AND THE PROOFS, THE VENUE WAS PROVEN.

It is contended that there was a variance between the allegations of the indictment and the testimony

in support thereof in this, that it was charged that the conspiracy was formed in San Francisco Bay, and that as a matter of fact there was no testimony relating to any occurrence therein, except to the arrest of O'Hagan and the crew of the "Giulia", and it is argued that accordingly the venue was not proven. It is sufficient to refer to the record.

It would seem that counsel misapprehends or overlooks the record in this regard: For there has rarely been a case where the proofs on the part of the government were so conclusive as to this particular feature. To afford the necessary proof of the venue of the crime it would have been necessary for the government to prove only that the formation of the conspiracy was within the jurisdiction, or that any alleged overt act was committed within the jurisdiction.

Hyde v. U. S., 255 U. S. 347; 56 L. ed. 1114.

Here the government did both; it did more; to an unusual degree it was able to prove by direct rather than circumstantial evidence the actual formation of the conspiracy—the actual "breathing together"; for it was shown that conspirator Henderson and conspirator McMillan were closely associated (R. 49, 159); it was further shown that certain of Henderson's activities were carried on at the office of the Columbo Bullion Mine Syndicate at 625 Market Street in this City; that Henderson met plaintiff in error at the Stanford Court Apartments in this city and there agreed with him as set forth, that is to say, Hender-

son intrusted him with sums of money and Campanelli was to receive a dollar for each and every case of liquor delivered from certain ships specified, being the "Ardenza" and the "Frontiersman", and that his duty was to appear at the point of delivery, collect the money due for the liquor and either deposit the same to his own bank account or at the Stanford Court Apartments make settlement with Henderson (R. 160). It was further shown that at the request of Henderson in San Francisco, Campanelli arranged with one Alioto of San Francisco to help in transferring cargoes from the "Giulia" to points along the shore (R. 162). This alone would have been the actual formation of the conspiracy. Further, it was shown that pursuant to such request Campanelli actually arranged with Alioto to transfer liquor from the "Giulia" to the shore in the "Gnat" (R. 121), and that pursuant to such arrangement the witnesses Herman and Salvatore Alioto actually brought liquor from the "Giulia" in the "Gnat" to shore (R. 128), the liquor being landed in South San Francisco (R. 125), Campanelli accompanying on some of the trips. It was further shown that witness Sturdevant assisted in coaling the "Giulia" on the 15th of September, 1925, in Drakes Bay from 500 yards to a mile from the shore and within the limits of the United States and within this district (R. 126). Witness Landl brought ashore a cargo of the liquor (R. 134). The transactions referred to in which the motorboat "Gnat" was considered were charged as one of the overt acts (R. 10).

There can be no question but that the venue of the conspiracy was conclusively proven.

II.

THE COURT DID NOT ERR IN ADMITTING EVIDENCE RELATING TO THE SHIP "ARDENZA", OR RELATING TO THE DEFENDANT HENDERSON.

The conspiracy charged here was a general conspiracy and the testimony clearly established such a conspiracy. The main conspirators, Henderson, McMillan and Campanelli, while affording the element of unity to the conspiracy were wholly unconcerned as to what agencies or means would be used; they were indifferent as to what motorboat owners would be brought in to make shore connections. It would be immaterial to them where they obtained the liquor or by what ships it was brought to the Farallone Islands. Accordingly the government properly charged a general conspiracy as distinguished from a particular conspiracy.

Dealy v. U. S., 152 U. S. 539; 38 L. Ed. 545.

If it were otherwise, the greater the conspiracy, the more difficult it would be for the government to punish it. All of the matters proven in the case at bar were of the character of overt acts in the conspiracy so described. They even coincided in time and place with the description. The conspirators, as far as the government could show, made use of two seagoing vessels in order to bring the liquors off the Heads—the

"Ardenza" and the ship called first the "Frontiersman" and subsequently the "Giulia". The necessary unity between the two ships was clearly shown in the statement of Campanelli. Besides being ships bringing intoxicating liquors off San Francisco for introduction ashore, and bringing them at the time specified in the indictment, the ships were grouped together in the undertaking between Henderson and plaintiff in error in that he was to receive a dollar for each and every case delivered from these certain ships—the *"Ardenza" and the "Frontiersman"* (R. 155, 160). Under such understanding the proceeds were to be collected by Campanelli and generally banked in his own account (R. 155, 160). He had such an account in the Mercantile Trust Company covering the period from July 21, 1923 to August 28, 1924, aggregating a large amount, $157,611.02. Since the exhibit is not brought into the record by plaintiff in error it will not be clear to this court what further features were in the account. The situation thus presented was similar to that found in the "Quadra" case. It was contended that while proof of the activities of the *"Quadra"* might not have been proper, it was not proper to prove what was done with respect to the Steamer *"Norburn"*; but it was pointed out that the contract of Quartararo with another to bring the liquor ashore embraced both ships and thus afforded the necessary connection, the court saying that the matter was not governed by the two authorities cited.

Ford v. U. S., 10 Fed. (2d) 339, 348.

The following excerpt illustrates the view of this court:

> "It is contended that there was error in receiving the testimony of Sam Crivello about the liquor secured by him from the Norburn about the 1st of May, 1924, and delivered to Quartararo at Oakland creek. It is argued that this incident bore no relation to the conspiracy involved in the present prosecution. Plaintiffs in error cite Terry v. U. S. (C. C. A.), 7 F. (2d) 28, and Crowley v. U. S. (C. C. A.) 8 F. (2d) 118). These cases hold, that, in a prosecution for conspiracy, the government's evidence must be confined to proof of the conspiracy charged, and the Terry case holds that 'the scope of the conspiracy must be gathered from the testimony'. Within these rules we think the testimony as to the Norburn incident was admissible. The government explicitly proved that, prior to Crivello's reception of liquor from the Norburn, he had been employed by Quartararo to receive and transport liquor from various vessels and to deliver it to Quartararo at Oakland creek. Here was clear proof of a conspiracy between these two defendants, within the allegations of the indictment."

And in the case of

Marron v. U. S., 10 Fed. (2d) 251,

the same contention was made upon the same authorities. There it appeared that the greater portion of the proof on the part of the prosecution concerned the business carried on by the parties at 1249 Polk Street, San Francisco. Testimony was received, however, as to the storage of a considerable quantity of liquor by Marron only at another point, at 2031

Steiner Street. Liquor was seized at this point under a proper warrant and the only question raised was as to the relevancy of this evidence as to the conspiracy. The court said,

> "It was the contention of the government that, shortly after the date of this seizure, Marron made arrangements with the defendant Brandt to cooperate with him in running the establishment at 1249 Polk Street. *The fact that Marron was well stocked with liquor at this time was a circumstance which the jury had a right to consider.*"

It thus appears that as in the *Ford* case and in the *Marron* case, there was the necessary connection shown between the two lines of proof to couple them together in the same conspiracy. Manifestly they were in some conspiracy and, being so coupled together, it cannot be held that it was the case of two independent conspiracies within the same general description. While on the other hand, in the *Terry* case, the theory proceeded on was that some of the defendants might have been convicted of one conspiracy and some of another, although the two conspiracies were entirely different; or that certain groups of persons were cooperating without any privity, each with the other and not towards the common end, toward separate ends.

And in the *Crowley* case it was said that

> "In order to make such evidence admissible there must be such a showing of *connection* between the different transactions as raises a fair inference of a common motive in each."

Here the necessary connection was shown in that the undertaking of Campanelli with Henderson embraced within its very terms both ships and contemplated moving the liquor from them by shore boats to be employed and supervised by Campanelli. The case is thus seen to be governed not by the *Terry* or *Crowley* cases but by the *Marron* and *Ford* cases.

III.

THE COURT DID NOT ERR IN RECEIVING TESTIMONY RELATIVE TO THE BOAT "MAE HEYMAN".

Certain evidence was submitted tending to show the purchase of coal for the "Mae Heyman" by the co-conspirator McMillan in December, 1923, and its delivery to that boat. This testimony was relevant to show that McMillan was the owner and operator of that boat at that time. It would have had no other effect and would have been proper evidence to prove such possession or operation. No other activity of the boat was shown in that month. As to this element of the proof, we submit that no question could be made as to the receipt of the evidence upon that issue, if the boat itself was subsequently connected with the case.

Later, on April 10, 1924, the boat "Mae Heyman" was seized by Prohibition Agents at 16th Street Pier in San Francisco at about 10:30 P. M. at a time when the operators were endeavoring to unload ashore the boat's cargo of liquor consisting of 1705 cases of

liquor (R. 47), described as in pint bottles with a heavy wrapper around and then in regular sacks sewed tight in the ends just like smuggled scotch would come in. This was within the period charged as the time during which the conspiracy was effective; it was within the time during which Campanelli maintained the bank account properly brought into the consideration of the case as hereinafter set forth. It was within the allegations of the indictment; it was at a time when the "Ardenza" with its cargo of liquor owned by Henderson was hovering outside the Heads, endeavoring to introduce the liquor ashore (R. 51). It was otherwise shown that McMillan was closely connected with Henderson (R. 159), who in turn had contracted with plaintiff in error to remove the liquor from the "Ardenza", as well as the "Giulia" at $1.00 per case (R. 155).

Accordingly, it is seen that at a time when the ship "Ardenza" in which the conspirator Henderson was interested, owning at least the cargo, was hovering outside the Heads, a boat owned and operated by Henderson's fellow conspirator with close connections was detected in attempting to smuggle ashore a large quantity of liquor, apparently smuggled, and while Campanelli was under contract to see that this very thing be done and to receive a dollar a case for its distribution. From such facts, clearly the jury was entitled to infer that the activity of the boat "Mae Heyman" was one of the means of the main conspiracy charged and proven.

Ford v. U. S., 10 Fed. (2d) 339.

IV.

THE COURT DID NOT ERR IN RECEIVING IN EVIDENCE THE BANK ACCOUNT OF PLAINTIFF IN ERROR.

There was put in evidence a bank account of plaintiff in error from the records of the Mercantile Trust Company verified by the manager thereof. The details of this account cannot be seen since the exhibit is not embraced in a bill of exceptions, but enough appeared to show that it was the bank account of Campanelli during the period referred to in the testimony and that the deposit aggregated a large amount. It would clearly be taken in *corroboration* of his statement to witness Oftedal that at Henderson's suggestion he deposited such money to his own account (R. 160). It would also show the *commission* of what would be an *overt act* by Campanelli in carrying out the conspiracy. The testimonial guaranty of trustworthiness was afforded by the statement of the manager of the branch wherein the account was kept that he knew the account was Campanelli's and that he "checks up checks that come in and out" and that everything in the bank is done under his supervision; the books are kept under him (R. 197, 199). As to the individual items, nothing can be said respecting them since Exhibit "10" is not included in the record but the fact that the total deposit aggregating a large sum was deposed to by the witness. The testimony was thus clearly relevant and produced under the proper guaranty of trustworthiness.

V.

THE COURT DID NOT ERR IN RESPECT TO THE ADMISSION OF EVIDENCE OF PAPERS TAKEN FROM THE POSSESSION OF DEFENDANT O'HAGAN.

As we have seen, O'Hagan and the crew of the "Giulia" were forced to abandon and sink that ship at sea. After a few hours they were rescued by the Steamer "Brookings", brought to the port of San Francisco and placed under restraint. The defendant O'Hagan, having indicated that he was the master of the sunken "Giulia", was examined by custom officers and found to be in possession of certain documents apparently constituting ship's papers. As the court stated (R. 58), it was understood that the papers were offered as papers that the captain surrendered to the custom officers.

Thereupon O'Hagan was examined before Custom Officer Creighton and made a statement. This statement was put in evidence against O'Hagan only; it being conceded that since it was made subsequent to the end of the conspiracy it could have bound only himself. The court clearly indicated this in its rulings (R. 69).

Subsequently, however, O'Hagan testified at length and we do not see that the statement would have added much to the case against him other than what he willingly testified to (R. 231, et seq.). In addition to this statement the receipt of which in evidence is not complained of, documents found in O'Hagan's possession were offered in evidence. As to one of

them, a certain letter apparently addressed to Campanelli, the court wholly excluded it from evidence even as against O'Hagan (R. 200). This exclusion applied to both the letter and the translation (Exhibits 5 and 6); it could not have affected the case in view of the court's specific direction (R. 201). It thus appears that the statement of Captain O'Hagan as well as the letter referred to could not have affected Campanelli.

There were, however, four exhibits put in evidence, contents of which however are not very clearly set forth. Exhibit 1 (R. 55) was apparently a receipt for packages of whiskey containing a certain statement as to the non delivery within twenty miles of the coast of the United States. The only objection to this was want of foundation. It was thought that the necessary integrity was imparted to the document from the circumstances of its origin. In any event, when Captain O'Hagan testified (R. 233) he afforded the necessary foundation by saying that his copy of the bill of lading as to the contents of cargo had already been offered in evidence, and that he insisted on the insertion of the clause referred to (R. 232). Exhibit 2 does not appear in the record unless the document set out at page 86 would be a copy; if so, it merely appears to be a registry by the authorities of Panama or a *"patente de nacionalizacion"*, but anything shown by such exhibit was freely testified to by Captain O'Hagan in reference to the registry of the "Giulia" (R. 232) and thus would have made the necessary foundation. The con-

tents of Exhibit "3" do not appear from the record (R. 59).

Exhibit "4" (R. 60) is merely described as a manifest of cargo shipped on the voyage referred to and as listing the same liquors as the other document. Its contents do not otherwise appear from the record. Testimony of Defendant O'Hagan (R. 232) substantially to the effect that Exhibit "1" was the copy of the bill of lading as to the contents of the cargo would show beyond any question what the cargo consisted of. The defendants put in evidence a copy of the bill of sale of the "Giulia" as Exhibit "F" (R. 240, ...).

The principal objection now urged in the brief of plaintiff in error to these documents or some of them, that while admitted in evidence as to O'Hagan only they would prejudice the case of the other defendants. We are unable to see how this could be so. The court clearly instructed the jury and the letter in Italian, as to which the principal complaint is made was clearly excluded from evidence for all purposes (R. 200, 201). Considering the testimony of defendant O'Hagan, there would be little or no dispute as to the matters indicated by the so-called ship's papers.

VI.

THE COURT DID NOT ERR IN ADMITTING IN EVIDENCE THE STATEMENTS OF DEFENDANTS DANIELS AND RODNEY.

Defendants Daniels and Rodney were two of the crew of the "Giulia" and with others of the crew

charged as conspirators. It was clearly shown that they were concerned in the activities of the "Giulia" here brought under review. Apparently they defended upon the theory of their ignorance or non-knowledge, such as might be attributed to mere seamen. It was proper, however, to charge them in the same indictment with the others, and it was proper to bring them on for trial at the same time. Indeed, there is no suggestion now to the contrary, nor was any application for severance made.

Such being the situation, any evidence relevant to prove the guilt of these two defendants was properly received and clearly the fact that the conspiracy may have ended would not prevent the government from proving as against them confessions made later. The right of other defendants would be solely to request and have given a proper instruction excluding the evidence from any consideration of their respective cases. It was proper to receive the evidence when offered.

Itoe v. U. S., 223 Fed. 25, 29;
Pappas v. U. S., 292 Fed. 982.

Moreover, whether requested or not the court did instruct the jury that these statements should not be considered as against any other of the defendants except the defendants making the statements (R. 262). And the court expressly stated at the time of the receipt of evidence of statements (R. 98):

> "The jury will understand that these statements are only evidence against Daniels and Rodney and not anybody that he mentions in the statement; that is all they are."

These two defendants were acquitted. In view of the direction of the court in its charge, as well as at the time of the receipt of the testimony it cannot be considered that the statements in any manner affected the case of plaintiff in error Campanelli.

VII.

THE COURT DID NOT ERR IN REFUSING THE REQUEST OF THE DEFENDANT DESIGNATED AS NUMBER XVII.

It is claimed in the Seventh Section of the brief of defendant that the court erred in refusing to give to the jury at his request a certain instruction said to relate to circumstantial evidence, and reference is made in that behalf to page 317 of the record. The instruction so referred to is upon the general proposition that in cases turning upon the circumstantial evidence, if there be two conclusions that can be reasonably drawn from facts, one favoring innocence, the jury shall adopt the milder; that as the instruction states, "there as here, the proof relied upon shall govern was purely circumstantial in its character", the result indicated should follow.

We think the answer to the contention is manifold.

(a) The instruction so quoted appears to be quoted from plaintiff's "assignment of errors". We are unable to find it set forth in the *bill* of *exceptions* or in any other part of the record. Especially, we are unable to find in the bill of exceptions, where it alone could appear properly, any statement of the

charges requested by plaintiff in error. In such case, of course, the refusal of the instruction cannot be considered.

Feigin v. U. S., 279 Fed. 107;
Walker v. U. S., 7 Fed. (2d) 309.

(b) If the instruction were proposed as set forth in the assignment it would have been improper to be given for it requires the court to state that the proof relied upon by the government in the instant case "was purely circumstantial in its character". This was not true for the government was able to produce *direct evidence* that Campanelli sat down and agreed with Henderson as to the very plan in which Campanelli was engaged in carrying out the conspiracy. This being direct testimony, the instruction requested would have required the court to state to the jury what was not the fact.

Moreover, such an instruction would have been improper to be given where the testimony is *in part direct.* The theory of the instruction is that if the government establishes all the facts claimed, yet, if a milder inference may be reasonably drawn as to the conceded facts, the jury must draw such mild inference and acquit. But here the testimony tends to prove an element of the charge directly, such fact could not be consistent with innocence, and for the court to state the principle would be to ignore the fact. Accordingly, it is generally held that this instruction upon circumstantial evidence is not adapted to cases where there is direct proof of guilt

or where the proof is in part direct and in part circumstantial.

See Monograph note on the point in *Beason v. State,* 69 L. R. A. 193, Sec. IV of note, p. 209.

(c) The trial was free from error on this point for another reason. Although the court was not required to instruct on the matter, as we have seen, yet in its charge (p. 260) it said

> "if there is any reasonable theory upon which you can reconcile the evidence consistent with the innocence of the defendants it is your duty to do so".

Other proper instructions were given by the court upon the general rule of reasonable doubt and presumption of innocence. No exceptions whatever were taken to the charge as given.

We think the assignment of error on this point is not supported by the record and, if it were, it was not well taken.

VIII.

THE COURT DID NOT ERR IN REFUSING REQUESTS WITH REFERENCE TO THE CONFESSION OF PLAINTIFF IN ERROR.

It is contended that the court erred in refusing three several requests upon the subject of the confession of the defendant, and a reference is made to page 320 of the transcript which reference quotes certain alleged requests from the "assignment of errors". The considerations referred to in the pre-

ceding section will prevent the court from considering this assignment for the reason that the charge requested by plaintiff in error is not set forth in the bill of exceptions and does not appear anywhere else in the record.

If we were to consider the requests set forth in the assignment of errors, it is apparent that they were inaccurate, and that the charge actually given by the court hereinafter referred to, was more correct. It is not true, for example, that a confession freely and voluntarily given must still be excluded, unless the party is also made fully advised of "his rights" and warned that anything he might say could later be used against him. Such formal ceremonial statements are not necessary to be shown as a condition of showing the voluntary character of the confession. In fact the presumption is that the confession was voluntary.

Gray v. U. S., 9 Fed. (2d) 337, 339.

In one of the charges so referred to, the court was asked to tell the jury that in determining whether the confession was free and voluntary, they were entitled to take into consideration—not certain other *testimony* but *the fact* that Campanelli was brought to the government agents by a government representative, etc., the court being thus asked to tell the jury that certain contentions of the defendant which the government disputed was "facts".

In any event, the law was properly covered by the court in its charge upon the subject as follows:

"If there is any reasonable theory upon which you can reconcile the evidence, consistent with the innocence of the defendants, it is your duty to do so" (R. 260).

"There was introduced during the trial numerous statements or alleged statements made by various defendants to the Government officers. These statements were made after this conspiracy, if any, was ended, and, therefore, the statements made by these individuals are not evidence against anybody except themselves; * * * But the statements made by these people, if freely and voluntarily made, are competent evidence as against themselves and should be considered by the jury as against the party making the statement. Now, in weighing the statements, you should consider the circumstances under which they were obtained; if they were not voluntarily made, or if they were made under promise of immunity, or inducement of any kind, they should be disregarded; but if they were freely and voluntarily made you should give them such weight as you think they are entitled to. And in judging them, as I said, you should take into consideration the circumstances under which they were made, the time they were made, and those that are not signed—I believe there was perhaps one that was signed, the captain's—those that were not signed, of course, depend upon the recollection of the testimony of those who testified here as to what the statements were" (R. 262-263).

CONCLUSION.

In conclusion, we show:

That the conspiracy charged as against the defendants was clearly proven as against the plaintiff in error; that there were no errors in or exceptions to the court's charge; that it does not appear that the court erred in respect to refused requests; that the receipt of the evidence challenged was proper and justified by precedents; that the defendant was shown to be an important element in an elaborate conspiracy to introduce liquor into the United States from abroad contrary to law. This conviction is just and should be upheld.

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No. 4568

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

GUISEPPI CAMPANELLI,
Plaintiff in Error,

vs.

UNITED STATES OF AMERICA,
Defendant in Error.

REPLY BRIEF FOR DEFENDANT IN ERROR.

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REPLY BRIEF FOR DEFENDANT IN ERROR.

The plaintiff in error has presented a typewritten reply brief to the brief heretofore filed on behalf of the Government in this case. He seeks to "clarify" certain issues which he contends "were only clouded by the brief of the defendant in error". It will be noted, however, that his clarification does not take the form of any close consideration of the evidence.

Note is taken to the Government's reference to the *Dealey* case and to what is said in that case of a charge of *general* conspiracy as distinguished from a charge of a *particular* conspiracy, and it is pointed out that in the *Terry* case there is also a general conspiracy charge, but the distinction between the evidence in the instant case and that in the *Terry* case

constitutes the real distinction here contended for. We merely noted the general character of the charge as being sufficient to authorize the court and jury to consider the broad conspiracy here proven.

The charge here is the formation of a conspiracy to commit divers offenses against the United States in general. As far as the indictment is concerned, it is not limited to any particular enterprise. It is broad enough to include the large enterprise actually proven.

Nor does the case present any difficulties in regard to the time element. It is charged that the parties conspired on February 1st, 1924, the exact date unknown, and that it was continuous at all times up to the filing of the indictment. The proof did not vary from such time for it was shown that the project during the year of 1924 up to the time of the sinking of the *"Guilia"* was flourishing like a "green bay tree". It is thus not the case of a charge for example, the sale of narcotics on February 1st, 1924, and the proof of the sale described the preceding autumn for the Government did prove the actual commission of the crime as of the very date alleged. It does not render the Government's case defective or constitute a variance for it to prove that the crime was larger and of greater proportions or that it had existed for a longer period than charged. In other words, the conspiracy was effective on February 1st, 1924, and during the succeeding summer and the same conspiracy was effective during the preceding autumn.

It is therefore not the case of a charge of an act as of one date and the proof of the act as of an earlier date, although it is well settled that in the latter situation—

> "Neither is it necessary to prove that the offense was committed upon the day alleged, unless a particular day be made material by the statute creating the offense. Ordinarily, proof of any day before the finding of the indictment and within the statute of limitations would be sufficient."
>
> *Ledbetter v. U. S.,* 170 U. S. 606; 42 L. Ed. 1162, 1164.

There is also an assumption on the part of the plaintiff in error that the Government's proofs are limited by the overt acts set forth, but it is established beyond question that the allegation in an indictment for a conspiracy of one or more overt acts has not any such effect. It is only necessary for the Government to allege and prove *one* act by *one* conspirator done to *effect* the *object* of the *conspiracy.* It may even be not criminal. There is no necessity, in order to establish a crime, to allege or prove more than *one* such act. Hence it would be absurd that the case of the Government is to be considered to be limited to such overt act or acts, as may have been alleged.

The *Terry* case only established that, accepting the charge in the indictment as general (although it may have been limited to the incident at Allen's Wharf by virtue of the language in the charge) from

the *character* of the Government's *proof,* it was to be taken as limited to that incident. In other words, it was the proofs that limited the conspiracy and not the indictment.

THE EVIDENCE IN THE INSTANT CASE.

Here the testimony is ample and overwhelming to establish the broader conspiracy and to link together in a single enterprise all the various incidents and groups.

To refer to the salient features of the evidence:

The head and front of the conspiracy was defendant *Daniel Henderson.* He is shown to have been the owner of the liquors sought to be introduced by the *"Ardenza"* and *"Guilia".* He had brought liquor from Scotland to Havana and even had a warehouse there to store it (R. 161). He began operations at San Francisco as at least as early as the spring of 1923. Witness MacNevin had started a mining venture with one Manning. A little later Manning brought in Henderson and Stevens, represented as being English capitalists (R. 51). These parties at first made their headquarters at the Colombo Mining Company, San Francisco. Henderson had as a confidential agent or representative one *Guyvan McMillan* (R. 159). He seemed to be acting as secretary for Henderson (R. 50). At that time Stevens was the owner of the ship *"Ardenza"* and *Henderson owned* the *cargo* (R. 51). The ship was standing outside the heads of San Francisco Bay (R. 51).

In such state of the situation, plaintiff in error *Campanelli* became acquainted with *Henderson* and *McMillan,* and after a short acquaintance entered into the conspiracy with them, especially with Henderson, whereby Campanelli was to receive $1.00 a case for liquor delivered from Henderson's ships (R. 160). The *"Ardenza"* and *"Frontiersman"* were mentioned. Campanelli's duty was to appear at the point of delivery, collect the money for the liquor, and either given it to Henderson at the Stanford Court Apartments or bank it for him (R. 160). The bank account so established commenced July 21st, 1923, and ended August 28th, 1924 (R. 195).

In such state of dealings between the parties, early in 1924, Henderson planned to bring another cargo of liquor from Havana. For that purpose he purchased the steamer "Frontiersman" at San Pedro, this purchase being effected by Henderson's agent, McMillan, who took the title, and with the assistance of Campanelli (R. 119). Thereupon McMillan arranged for the crew for the ship going to Havana (R. 231) and Campanelli and Henderson went to Havana, Henderson there taking charge (R. 242). On return Campanelli, at Henderson's request, arranged for small boats to take off the cargo and take supplies to the ship, by that time called the "Guilia", as well to go to Ensenada to clear up a difficulty over the coaling (R. 162).

It is thus seen that from July 21st, 1923, up to August 28th, 1924, there was a general conspiracy of the type charged in the indictment; that Henderson

was the center and chief of the enterprise, that McMillan was closely associated with him and that from July 21st on Campanelli had definitely entered the conspiracy and was engaged in assisting Henderson in carrying it out.

The liquor, as the jury may have inferred, was brought from Scotland and placed in a warehouse or depot at Havana with the intention of bringing cargoes off the heads at San Francisco for introduction to the San Francisco market through small boats in the manner disclosed by Campanelli, he to collect the money and bank it for Henderson.

The Government did not charge in the indictment the *means* by which the conspiracy was to be carried out. It is a familiar rule that where the enterprise is criminal, that is to say where the conspiracy is to commit crime, it is not necessary to set forth the means.

Proffitt v. U. S., 264 Fed. 299.

It is only necessary to set forth the means when the main purpose of the conspiracy is not unlawful. Here the thing charged was unlawful. It was not necessary to set forth the means and the Government was entitled to prove the means used or any of them, without averment. There is no more reason for including the *"Guilia"* as one of the means than there is for including the *"Ardenza"*. The conspirators were indifferent as to means. They had used other vessels, and probably in the beginning did not contemplate any particular vessel.

In any event the group of seamen concerned in the trip of the *"Guilia"* are merely in the situation of parties coming into the conspiracy later with knowledge of the conspiracy. As far as concerns Henderson, McMillan and Campanelli, their actions all pertained to the center of the conspiracy which was carried out by subordinate groups and joined them all together, just as the agreement of Campanelli with Henderson referred in the same connection to both ships. He was to get $1.00 a case for liquor removed from the *"Ardenza"* as well as the *"Guilia"*.

(a) There Was No Variance.

The plaintiff in error still contends that there was a variance between the indictment and the proofs in that outside of the arrest of Captain O'Hagan there was no evidence of the formation of a conspiracy at the Bay of San Francisco.

There is no reference to or discussion of the cogent proofs of the Government in this regard cited in its opening brief; for, to say nothing of numerous other circumstances, we may instance, that about 20 days after leaving Havana, Campanelli received a 'phone call from Henderson inviting him to the Clift Hotel in this city where Henderson told him that there were 8500 cases of liquor aboard the *"Guilia"* and he would like to have Campanelli assist in the matter of disposing of the cargo, offering to pay him $1.00 a case and suggesting that one Alioto, who had assisted in unloading liquors on previous occasions, would help

in the matter of unloading the *"Guilia"*. Thereupon at Henderson's request, Campanelli arranged with Alioto to unload the liquor at $2.50 a case (R. 151).

A week later the same parties met at Columbus Avenue, in the same city, wherein an agreement was made that Campanelli go to Ensenada to assist in coaling the *"Guilia"* (R. 152). Later, on the arrival of the ship at Henderson's direction, Campanelli made a trip out to the *"Guilia"* by the launch *"Gnat"* transferring some provisions thereto (R. 163).

On the 8th or 10th day of September, 1924, Campanelli hired from Alioto the boat *"Gnat"* to bring provisions out. Later he received from Campanelli $2500.00 on account of bringing in liquor, the receipt being at Columbus Avenue, this city (R. 121). In fact, it is difficult to conceive of a case where the proof of the venue or the proof of the conspiracy being in San Francisco was more clearly proven.

(b) As to Testimony Regarding the "Ardenza".

The reference to the *"Ardenza"* first came into the case by the testimony of witness MacNevin (R. 51) where it is seen that such testimony appears in the record by question and answer and that there is no objection whatever to that feature of the case.

The so-called "Black Book" was not referred to in the case except at page 52 of the record; there is no objection to the receipt of that testimony. The subsequent motions to strike out, even if they were directed to such feature, which they were not, would

be within the discretion of the court as to anything not previously objected to.

The only subsequent reference to the *"Ardenza"* were in the testimony of witness Oftedal wherein he detailed certain statements as made by Campanelli. The first statement of Campanelli was in writing (but did not refer to the *"Ardenza"*). Upon being offered, Campanelli's counsel objected that it was *immaterial, irrelevant and incompetent,* had no proper *foundation,* and not shown to have been obtained freely and *voluntarily* (R. 144). Thereupon the witness was questioned at length in an endeavor to show the involuntary character of the statements, but without result.

Thereupon witness was asked as to a further conversation with Campanelli in December, 1924. The only objection made by counsel for Campanelli was, "May we have the same objection as to this testimony as we did to the other", evidently referring to the previous matter. Thereupon the witness detailed what Campanelli said of the enterprise and this without objection on behalf of Campanelli. Certain objections were made on behalf of De Maria on points that would not have availed to Campanelli. The testimony so given was to the effect, among other things, that Henderson would arrange with Campanelli every so often to figure out how much was due as a result of the quantity unloaded from the ship *"Ardenza"*, as well as the *"Frontiersman"* and the *"Giulia"* (R. 155). There was no objection by Campanelli to this

statement. Further on Oftedal related more in detail the admissions of Campanelli, referring to his statement that Henderson entrusted him with large sums of money and said he was to receive a dollar for each and every case delivered from these certain ships—the *"Ardenza"* and the *"Frontiersman"* whether he took part in the sales or not; that his duty was to appear at the point of delivery, collect the money, sometimes pay it to Henderson and other times deposit it in the bank (R. 160). Campanelli, himself, according to the statement, thus grouped the two ships together as concerned in his deal, nor was there any objection made to that testimony (R. 160).

We have not found any subsequent reference to the *"Ardenza"* or any reference to the *"Ardenza"* in the testimony of Oftedal, except at pages 155 and 160 of the record, wherein it is seen that no objection was made to the receipt in evidence as to testimony of these features of the statement of Campanelli. There were, perhaps, motions made subsequently to strike out (R. 202). But the court's attention was not directed to any part of this statement, but included all, and the objection stressed was that the statement was not voluntary.

We think the rule is that where testimony is not objected to previous to its receipt, a motion to strike out is substantially within the discretion of the court, and that error may not be assigned to the refusal thereof.

But we need not dwell upon these features of the record, as manifestly against any objection that could have been interposed; it was proper to prove that the three named conspirators, *Henderson, McMillan* and *Campanelli* used the various means referred to in carrying out the deal, including the possession, control or use of the different vessels, the *"Guilia"*, the *"Ardenza"*, the *"Heyman"*, the *"Gnat"*, or any other ship which the jury may have inferred was used in the enterprise.

First there is nothing in the contention that the matter was too remote because the ship was owned by one Stevens who was not a defendant in the present case; for while Stevens owned the vessel, *Henderson, a named conspirator, owned the cargo* (R. 51). Moreover, Stevens was associated with Henderson (R. 51). He was one of the parties who went to Havana at the time that Henderson and others went there to obtain for the *"Guilia"* the cargo of liquors. O'Hagan states that Stevens also was present with Henderson and Campanelli (R. 241). Accordingly, Stevens would have been a conspirator and would have been included in the designation of one of the conspirators unknown to the Grand Jury and referred to in the indictment.

Thomas v. U. S., 156 Fed. 897.

It would have been permissible, indeed, under such a state of facts to prove the act or statement of Stevens in carrying out the conspiracy. But, as we have

seen, Campanelli, by his own statement, was closely connected with Henderson and McMillan, and that Henderson owned the *cargo* of liquors on the *"Ardenza"*.

As to the objection that the conspiracy was charged as of February 1st, 1924, and the *"Ardenza"* incidents were in the Spring of 1923, the answer is clear:

As to the Fact.

The acquaintance of Witness MacNevin with Henderson and McMillan began in the "Spring of 1923", but it was sometime later (at a time not stated) that Henderson made to MacNevin the reference to the *"Ardenza"* (R. 51). It does not appear but that the ship remained outside the heads for a much later period.

Moreover, Campanelli, according to his statement to Oftedal, while introduced to Henderson in the "Spring of 1923," did not enter the deal until later, and the commencement of the bank account, which included the sums received from the *"Ardenza,"* as well as the *"Frontiersman,"* did not start until July 21st, 1923 (R. 196). Accordingly it may be inferred that the *"Ardenza"* did not drop out of the enterprise until sometime late in 1924.

As to the Law.

There would be no objection to the evidence in that it concerned the same course of conduct as going on all along before the date mentioned in the indictment.

This precise application of the principle was made in the case of *Heike v. U. S.,* 227 U. S. 131, 145; 57 L. Ed. 450.

In that case the court pointed out that the indictment must of course charge a conspiracy not barred by the statutes, but that it was permissible to prove that the same course of fraud was entered long before and kept up.

This court referred to the same authority and made the same application of the principle in the case of *Houston v. U. S.,* 217 Fed. 852.

The conspiracy here was of a type found in several elaborate conspiracy cases recently prosecuted in various circuits of the United States and reported at length.

Thus a case of that type was

Remus v. U. S., 291 Fed. 501.

In that case the Circuit Court of the Sixth Circuit said:

> "The allegations of this indictment first above quoted clearly charges an existing conspiracy entered into between the defendants on April 20, 1919, and continuing until the time of the finding and presentation of the indictment, not for the commission of one offense only but for the commission of a continuity of offenses in violation of Title II of the National Prohibition Act by the unlawful transportation, possession and sale of intoxicating liquor (citing the Rudner case). If the purpose of the conspiracy contemplated the commission of one offense, the continuance of the result of the commission of that offense would not

necessarily continue the conspiracy; but if the purpose of the conspiracy contemplates, as charged in this indictment, continuous cooperation of the conspirators in the perpetration of a series of offenses against the United States within the scope and purpose of the conspiracy, it is in effect a 'partnership in criminal purposes' and continues until the time of its abandonment or the final accomplishment of its purpose. (Citing the case of *United States v. Kissell,* 218 U. S. 601; 54 L. Ed. 1168)."

And it was further said upon the authority of the *Ledbetter* case, supra:

"It was not necessary, however, for the government to prove that this conspiracy was formed on the exact date averred in the indictment."

And in the case of

Rudner v. U. S., 281 Fed. 516,

the same court said of a similar contention that there were a series of conspiracies between nonconfederate groups:

"Defendants contend that the evidence, if it shows any conspiracy, shows a series of conspiracies between nonconfederate groups of defendants. This contention grows out of this situation: The evidence shows without dispute (neither plaintiff in error testified) that the conspiracy was formed among the Canton defendants (some or all of them), of which conspiracy Ben Rudner was the head and front, embracing for its objects the various classes of acts charged in the indictment, and before any of the purchases of whisky involved in this case were made at Pittsburgh. The evidence is sufficient to sustain a conclusion that the conspiracy embraced broadly the pur-

chase by Ben Rudner of whiskey in Pittsburgh (or elsewhere, if more convenient), the illegal transporting of such whiskey to Canton, and its unlawful possession and sale there and in that vicinity. The testimony is to the effect that from the early part of the year 1920, until at least the month of October, Ben Rudner and his associates made a considerable number of wholesale purchases of whisky from Darling & Biener, at Pittsburgh, and that beginning about perhaps the middle of December, and for some months after that, similar purchases were made by Ben Rudner and his associates from the Naumans, or at least one of them.

The point raised is that, as the Naumans had nothing to do with any sales made by Darling & Biener, nor had Darling & Biener anything to do with sales made by the Naumans, and as those made by the latter were subsequent to those made by the former, there was thus no concert between Darling & Biener, on the one hand, and the Naumans, on the other. So far as the record shows the fact is as just stated; but in our opinion this does not subject either the indictment or the evidence to the criticism we are considering. A conspiracy under section 37 may be a continuous crime. Brown v. Elliott, 225 U. S. 392, 32 Sup. Ct. 812, 56 L. Ed. 1136. It was open to the jury to find that the conspiracy between Ben Rudner and some or all of the other Canton defendants was not only the initial, but the substantial and continuing, conspiracy which had the objects already stated. The jury was instructed, and we think correctly, that one joining a conspiracy after its formation, by contributing to its carrying out with knowledge thereof, would be liable, and that it was not necessary that any party to the conspiracy should know all who were in it (Thomas v. United States (C. C. A. 8) 156 Fed. 897, 912, 84 C. C. A. 477, 17 L. R. A. (N. S.) 720;

United States v. Standard Oil Co. (C. C. A. 8) 152 Fed. 290, 294, 295; and see United States v. L. S. & M. S. Ry. Co. (D. C.) 203 Fed. 295, 307); that it is enough that the Pittsburgh defendants knew that the Canton parties were engaged in that general conspiracy; and that it was not important whether one firm of Pittsburgh dealers know that the other Pittsburgh dealers were being similarly dealt with. The dropping out of Darling & Biener before the Naumans came in would thus not end such original conspiracy."

And in the case of

Ford v. U. S., 10 Fed. (2d) 338, 348,

it was said:

"It is contended that there was error in receiving the testimony of Sam Crivello about the liquor secured by him from the Norburn about the 1st of May, 1924, and delivered to Quartararo at Oakland creek. It is argued that this incident bore no relation to the conspiracy involved in the present prosecution. Plaintiffs in error cite Terry v. U. S., (C. C. A.) 7 F. (2d) 28, and Crowley v. U. S., (C. C. A.) 8 F. (2d) 118. These cases hold that, in a prosecution for conspiracy, the government's evidence must be confined to proof of the conspiracy charged, and the Terry case holds that 'the scope of the conspiracy must be gathered from the testimony'. Within these rules we think the testimony as to the Norburn incident was admissible. The Government explicitly proved that, prior to Crivello's reception of liquor from the Norburn, he had been employed by Quartararo to receive and transport liquor from various vessels and to deliver it to Quartararo at Oakland creek. Here was clear proof of a conspiracy between these two defendants, within the allegations of the indictment."

Another pertinent authority is the case of

Allen v. U. S., 4 Fed. 2d, 688.

In that case there was found an elaborate conspiracy to violate the National Prohibition Act involving a large number of persons, which the court found necessary to classify in separate groups, and it is seen from the groups referred to (Page 690) that certain of the groups probably had never heard of certain other groups, but were all part of the major conspiracy.

Manifestly in the instant case there was found such connection between the *"Ardenza"* and the conspiracy in which plaintiff in error was engaged.

As authority for the contentions of plaintiff in error here repeated references are made to the cases of

Crowley v. U. S.;
Terry v. U. S.

In those cases it was held that a particular incident should not have been proven, the theory being that the incident had no connection with the conspiracy proven. Thus in the *Crowley* case it was said of the incident that it did not appear to have had any relation to the charge of conspiracy for which the defendants were on trial; it did not tend to show that Crowley had acted in combination with any one named in the conspiracy charged, or that his possession of his liquor in August was part of a plan to violate the law subsequently, or that in any way it was *connected* with the offense under consideration.

Here the various means for carrying out the conspiracy and the various incidents in connection with such means in carrying out the conspiracy were all proper to be proved, being tied together, that is to say, closely connected with the main conspiracy of which *Henderson* was the head and *McMillan* and *Campanelli* principal lieutenants. The bank account was the same—it ran from July, 1923, to August, 1924; the mode of transacting the enterprise was the same at all times; the subject matter of the conspiracy was the same, as well as the purpose of the conspiracy. In a word, there was an elaborate enterprise wherein a man having apparently capital and resources undertook during the period from early summer of 1923 to the final failure of the enterprise in September or October, 1924 to introduce liquor into the San Francisco market from abroad. He would naturally be indifferent as to means as long as they were available and profitable; he was indifferent as to coadjutors, at times would take in one group, later drop them and take in another, but he did have plaintiff in error in close connection with him from the beginning to the end. It does not invade any of his rights, when on trial for his participation in such conspiracy, for the government to prove any or all of the means used.

(c) As to Testimony Concerning the "Mae Heyman".

It is contended that the court erred in receiving evidence concerning the vessel *"Mae Heyman"*. We think we show that the testimony would have been

properly received in the face of any objection, but we insist that under the record here there was no objection which the lower court could have considered. The matter is set forth in pages 46 and 47 of the Record wherein it is seen no objection or exception is taken until the testimony had all been received. Then a motion to strike out was made, denied and exception taken.

Moreover it was proper to show that any one of the conspirators was the owner or operator of the *"Mae Heyman,"* for it would have been proper to show that any one of them had means to carry out the criminal enterprise. Accordingly, any small boat could be shown to be owned or in the possession of McMillan, Henderson, Campanelli, or any other conspirator at material times.

A jury may be authorized to infer that a person owns property from a showing that he was in possession and exercising acts of ownership.

Cal. C. C. P., Section 1963, Subdivisions 11 and 12.

Therefore, it was proper to prove that McMillan purchased coal for the boat and had it delivered to the boat. The boat being thus shown to be in the possession and ownership of McMillan, the jury could well have inferred that the ownership and possession continued in the same condition from the short period from December to April.

It would be wholly immaterial whether the liquor subsequently found was beer or whiskey, or whether

it had been smuggled for *possession and sale* were purposes of the conspiracy, as well as smuggling.

As to the seizure of the *"Mae Heyman"* on April, 1924, that was also relevant; for at that very time there was a flagrant conspiracy existing between *Henderson, McMillan* and *Campanelli* to introduce liquor into San Francisco in small boats from the *"Ardenza"* outside. The facts that a small boat in the possession of one of the conspirators, laden with liquor, was apprehended in landing liquor in California at the very time would authorize the jury to infer that the *"Mae Heyman"* was one of the means of carrying out the conspiracy. It would be equivalent to the proof in the case of

Marron v. U. S., 8 Fed. (2d),

wherein it was held to be proper to prove that one of the conspirators had a stock of liquor at his home at 2031 Steiner Street, in that

> "The fact that McMillan was well stocked with liquor at this time was a circumstance which the jury had a right to consider."

This was said as to a claim that the matter was outside the conspiracy charged.

The acts of the *"Mae Heyman"* were within the allegations of the indictment in the sense that the boat was owned and used by one of the conspirators, *defendant McMillan,* and it was found *transporting* intoxicating liquor, the parties in charge, including McMillan, being in *possession* of the liquor, and the act being, as the jury may have inferred, under the

circumstances, an importation from a rum ship, shown to have been standing outside the heads of San Francisco, to the San Francisco market.

The contention that the *"Mae Heyman"* was not referred to in the indictment rests upon the assumption that since it was not referred to as one of the overt acts, it is thus left without the scope of the indictment. This involves a misapprehension of the bearing and purpose of allegations of overt acts, for as we have seen it is only necessary to allege that *one* conspirator committed *one* act, criminal or otherwise, to *effect* the *object* of the conspiracy. Accordingly it can be of no significance that any particular means used in carrying on the conspiracy would not appear to be set forth as an overt act.

In conclusion we submit that we have shown; that as to the greater part of the Government's argument in its former brief, the plaintiff in error does not further contend; that as to the assumed variance, his discussion wholly ignores relevant evidence; and that as to the proof of the use by conspirators of the *"Ardenza"* and the *"Mae Heyman"* as means useful or used to carry out the enterprise there could not have been an error. The case is not governed by the holding in the *Terry* or *Crowley* cases. It is more nearly in resemblance to the *Ford* and *Marron* cases. It is easily justified by the holding of such cases as

Allen v. U. S., supra;
Rudner v. U. S., supra;
Remus v. U. S., supra;

hereinabove referred to.

It is submitted that the judgment should be affirmed.

GEO. J. HATFIELD,
United States Attorney,

T. J. SHERIDAN,
Assistant United States Attorney,
Attorneys for Defendant in Error.

NO. 4570

IN THE

United States
Circuit Court of Appeals
For the Ninth District

W. G. CRITZER,

Plaintiff in Error,

vs.

UNITED STATES OF AMERICA,

Defendant in Error.

Transcript of the Record

Upon Writ of Error from the United States District Court for the District of Idaho, Northern Division

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CAXTON PRINTERS, CALDWELL 29698

IN THE

United States
Circuit Court of Appeals
For the Ninth District

W. G. CRITZER,

Plaintiff in Error,

vs.

UNITED STATES OF AMERICA,

Defendant in Error.

Transcript of the Record

Upon Writ of Error from the United States District Court for the District of Idaho, Northern Division

NAMES AND ADDRESSES OF ATTORNEYS OF RECORD.

JOSEPH J. LAVIN,
HERMAN & MUNTER,
Spokane, Washington.
Attorneys for Plaintiff in Error.

E. G. DAVIS, U. S. District Attorney,
J. F. AILSHIE, Jr.,
WM. H. LANGROISE,
Assistant U. S. District Attorneys.
Boise, Idaho,
Attorneys for Defendant in Error.

INDEX

INDEX TO BILL OF EXCEPTIONS

IN THE DISTRICT COURT OF THE UNITED STATES, IN AND FOR THE DISTRICT OF IDAHO, NORTHERN DIVISION

UNITED STATES OF AMERICA,

vs.

W. G. CRITZER and
RAY W. (JOHN DOE) HAYDEN,

Defendants.

No. 2019.

INFORMATION.

E. G. Davis, United States Attorney for the District of Idaho, who for the United States in this behalf prosecutes in his own proper person, comes into Court on this 21st day of November, 1923, and with leave of the Court first had and obtained, upon his official oath gives the Court here to understand and be informed as follows:

COUNT ONE.

(Possession)

That W. G. Critzer and John Doe Hayden, late of the City of Spokane, County of Spokane, State of Washington, heretofore, to wit, on or about the 7TH DAY OF NOVEMBER, 1923, at a point near Deep Creek, in the County of Boundary, State of Idaho, in the Northern Division of the District of Idaho and within the jurisdiction of this Court, did, then and there, wilfully, knowingly and un-

lawfully, have in their possession certain intoxicating liquor containing more than one-half of one per cent alcohol, to wit, 23 sacks of Canadian Bonded Liquor, the same being designed, intended and fit for use as a beverage, the possession of same being then and there prohibited and unlawful, contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States of America.

COUNT TWO.

(Transporation)

That W. G. Critzer and John Doe Hayden, late of the City of Spokane, County of Spokane, State of Washington, heretofore, to wit, on or about the 7TH DAY OF NOVEMBER, 1923, from a place to informant unknown to a point near Deep Creek, in the County of Boundary, State of Idaho, in the Northern Division of the District of Idaho and within the jurisdiction of this Court, did, then and there, wilfully, knowingly and unlawfully transport a quantity of intoxicating liquor containing more than one-half of one per cent. of alcohol, to wit, 23 sacks of Canadian Bonded Liquor, the transportation of same being then and there prohibited and unlawful, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America.

COUNT THREE.

(Libel)

The W. G. Critzer and John Doe Hayden, late of the City of Spokane, County of Spokane, State of Washington, heretofore, to wit, on or about the 7TH DAY OF NOVEMBER, 1923, from a place to informant unknown to a point near Deep Creek, in the County of Boundary, State of Idaho, in the Northern Division of the District of Idaho, and within the jurisdiction of this Court, did, then and there, wilfully, knowingly and unlawfully transport intoxicating liquor, to wit, 23 sacks of Canadian Bonded Liquor, in one Hudson Five Passenger Speedster automobile, 1923 Model, Engine No. 164728, Washington 1923 License No. 16267, the transportation of same being then and there prohibited and unlawful, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America.

E. G. DAVIS,
United States Attorney for the District of Idaho.

United States of America)
District of Idaho)ss.
Northern Division)

William H. Langroise, being first duly sworn, on his oath deposes and says: That he is a duly appointed, qualified and acting Assistant United States Attorney for the District of Idaho, and that he makes this verifica-

tion as such; that he has read the above and foregoing information, knows the contents thereof, and that the facts and things therein stated are true as he verily believes.

WILLIAM H. LANGROISE,

Subscribed and sworn to before me this 21st day of November, 1923.

W. D. McREYNOLDS,
Clerk of the U. S. District Court.

(SEAL)

Leave is hereby granted to file the foregoing Information.

Let process issue and bonds be fixed in the sum of $500.00.

FRANK S. DIETRICH,
District Judge.

Endorsed, Filed, Nov. 23, 1923.
W. D. McREYNOLDS, Clerk.

MINUTE ENTRY—RECORD OF TRIAL

(Title of Court and Cause)

This cause came on for trial before the Court and a jury, W. H. Langroise, Assistant District Attorney, appearing for the United States, the defendant, W. G. Critzer and Ray W. Hayden being present with their counsel, Joe Lavin, Esq. The Clerk, under directions of the court, proceeded to draw from the jury box the names of twelve persons, one at a time, written on separate slips of paper, to secure a jury. Louis Sunkel whose name was so drawn, was excused for cause. Ralph Fisher whose name was also drawn, was excused on the plaintiff's peremptory challenge. Following

are the names of the persons whose names were drawn from the jury box, who were sworn and examined on voir dire, found duly qualified and who were sworn to well and truly try said cause and a true verdict render, to-wit:

Fred W. Graves, M. A. Peck, O. W. Brooks, R. J. Newington, B. C. Woolridge, W. B Turnbow, J. C. Waddell, Clarence Peck, C. B. Foot, J. H. Harold, A. C. Morbeck and John B. Steffes.

The information was read to the jury by the Assistant District Attorney who informed them of the defendants' plea entered thereto, whereupon, C. R. Knight, W. F. Dunning, W. C. Welch, John J. Cramway, Geo. R. Hesser, Teresa Hacket, Emma Simmons, E. E Crandall, Dan Dunning, Clarence Marcey, A. C. Henry were sworn and examined and other evidence was introduced and here the plaintiff rests.

Frank Keenan, Ray W. Hayden, W. G. Critzer and Harry Hayden were sworn and examined on the part of the defendants and here the defendants rest. On rebuttal A. C. Henry was recalled and further examined and here both sides close.

The cause was argued before the jury by counsel for the respective parties, after which the court instructed the jury and placed them in charge of Ludwig Roper, a bailiff duly sworn, and they retired to consider of their verdict.

On the same day the jury returned into court, the defendants and counsel being present, whereupon, the jury presented their written verdict, which was in the words following:

(Title of Court and Cause)

VERDICT NO. 2019.

"We, the jury in the above entitled cause, find the defendant W. G. Critzer, guilty on the first count, guilty on the second count, and guilty on the third count, as charged in the information.

We find the defendant Ray W. Hayden, not guilty on the first count, not guilty on the second count, and not guilty on the third count as charged in the information.

J. C. WADDELL, Foreman."

The verdict was recorded in the present of the jury, and then read to them, and they each confirmed the same.

IN THE DISTRICT COURT OF THE UNITED STATES, IN AND FOR THE STATE OF IDAHO, NORTHERN DIVISION

UNITED STATES OF AMERICA,

Plaintiff.

vs.

W. G. CRITZER and JOHN DOE (RAY W.) HAYDEN,

Defendants.

No. 2019.

BILL OF EXCEPTIONS

The said cause having come on regularly for trial, the following evidence was offered:

C. R. KNIGHT, a witness called on behalf of the plaintiff, having been first duly sworn on oath, testified as follows:

That he was a deputy sheriff, residing at Bonners Ferry, Idaho; that on the evening of November 7, 1923, in company with Sheriff Dunning and Deputy Sheriff Welch, he drove out to a point known as Deep Creek, having had a report that a couple of cars were coming through; that they placed obstacles across the road, and that about half past four on the morning of the 8th, three cars approached; that one jumped the barricade and proceeded westerly; that the second car went over the barricade and proceeded westerly, and that the third car turned easterly; that he took

after the one which went east, and being unable to locate the car, returned to the point where he had erected the barrier, and that at a point about a half mile west of where the barrier has been erected, he found a Hudson automobile standing in the roadway, stuck in the mud, with twenty-three cases of whiskey piled along the side of the car, and that a couple of cases had slid down against the running board of the car; that the car was in the middle of the road in a swampy place, and that it would not have been possible for another car to have passed there when the car in question was in the roadway; that the car was a Hudson car, 1923, touring; that a drivers license was attached to a little card on the switch with the name of W. G. Critzer upon it; that he saw the second car, the Hudson car referred to, stop at the point in the roadway after going over the barrier, and that no other cars had passed that point. Moravia is about a mile and a quarter by road from this point, and the closest post office.

W. F. DUNNING, called on behalf of the plaintiff, having been first duly sworn on oath, testified as follows:

That he is sheriff of Bonner County, residing at Bonners Ferry, Idaho; that on the evening of November 7, 1923, in company with the deputies Knight and Welch, he went to a point near Deep Creek; that a barrier was erected across the roadway; that the next morning between three and

four o'clock, three cars came from the north; that the first car broke through the barrier, and the second car did the same, and that the third car turned and went easterly; that the second car stopped a short distance west of the barrier on the roadway. Followed third car east about a mile and then returned to where car was stuck in mud; that after going down to the car which was stuck in the mud, he found twenty-three sacks of Canadian whiskey piled right outside of the car, and two or three of the sacks had slipped down off of the running board and were resting against the car; that the car in question bore a Washington license and a plate on the steering wheel had the name of W. G. Critzer on it; that on account of the position of the car and the swamp no other car could have passed; that he employed a team to haul the car and the whiskey to Bonners Ferry, and turned the liquor over to Federal Prohibition Agent Hesser, the liquor being in substantially the same condition as when found, and turned it over to the federal agent; that it was dark at the time.

W. C. WELSH, a witness called on behalf of the plaintiff, having been first duly sworn on oath, testified as follows:

That he is Deputy Sheriff of Boundary County, residing at Bonners Ferry, Idaho; that on the evening of November 7, 1923, in company with Sheriff Dunning and Deputy Sheriff Knight, he went to a point near Deep Creek and placed a barrier across

the public highway; that about four thirty o'clock in the morning, three booze cars came along; that the condition of the roadway beyond the point where the barriers were placed was a cedar swamp and the road was narrow, not over eight or nine feet wide; that two cars broke through the barrier, and the other car turned and went east; that they turned around and followed the car headed east, and being unable to find it, returned to a point a short distance west of the barrier where they found a Hudson car stuck in the mud and twenty-three cases of liquor, piled along the side of the car; that the car and contents was taken to Bonners Ferry and turned over to the federal officer.

JOHN J. CONWAY, a witness called on behalf of the plaintiff, having been first duly sworn on oath, testified as follows:

That he resides near Deep Creek; that on the morning of November 8, Sheriff Dunning came to his place about five thirty and employed him and his team to assist him in pulling an automobile that was in the roadway; that the road was soft and springy and some logs were along side of the road, and the car seemed to have jumped off and got caught on the log.

GEORGE R. HESSER, a witness called on behalf of the plaintiff, having been first duly sworn on oath, testified as follows:

That he is Federal Prohibition Agent, stationed at Sandpoint; that on November 12, 1923, a Hudson car and intoxicating liquor was turned over to him, and by him, placed in storage at Coeur d'Alene, Idaho; that the car bore a Washington license in a leather card case, and bore the name of W. G. Critzer; that he examined the contents of the sacks taken at the time and that they contained intoxicating liquor capable of being used as a beverage.

The five sacks of liquor received in evidence without objection and admitted to be intoxicating liquor. Defendants also admitted that car in question belonged to defendant Critzer and is car referred to and correctly described in count three of the information.

THERESA HATCHETT, a witness called on behalf of the plaintiff, having been first duly sworn on oath testified as follows:

That she is post mistress at Moravia, Idaho; that on the morning of November 8, 1923, a gentleman called at her house and asked if he might use the phone; that she could not recognize the man; whereupon, the following occurred:

BY MR. LANGROISE:

Q. I will ask you to look and see if you could recognize—

MR. LAVIN: I object to that as leading and suggestive.

COURT: You may see whether the man is in the court room or not.

A. No, I cannot place him at this time. That the man wanted to call up Spokane and wanted Main 606; that he tried to get the call through and couldn't, and that she called for him and central asked what the name was and she asked him and he said it was Hayden; that it was about nine or half past nine in the morning; that the man said he was cold and that he had been wading through the wet grass; that there was no one else present at the time except her mother, Emma Simmons; that she did not hear any part of the conversation except putting the call through; that central asked who wanted the call put through and she asked him and he said Hayden; that she kept no record of the transaction. The witness further testified that all she did was to put in the telephone call. That she then went about her work and did not hear any conversation.

EMMA SIMMONS, a witness called on behalf of the plaintiff, having been first duly sworn on oath, testified as follows:

That she resides at Moravia, Idaho with her daughter Theresa Hatchett, at the post office and store; that on November 8, 1923, a man called at the post office and store. The following occurred:

BY MR. LANGROISE:

Q. Would you be able to recognize that man at this time?

A. I couldn't say that I would.

Q. I will ask you to look about here in the court room and see if you can see the man—if you are able to recognize the man that came there.

A. No, I don't see him.

Q. You are not able to recognize the man at this time?

A. No.

That the man wanted to know if he could telephone, and that he called Main 606 at Spokane, and gave his name as Hayden; that she heard what he had to say over the phone, and he said: "Is this Louie?" and he said, "Tell Joe—I have lost everything—Will be in on 43"; and he further said, "Look out for Grant"; his clothes were damp and he spoke about coming through wet grass and weeds.

E. E. CRANDALL, a witness called on behalf of the plaintiff, having been first duly sworn on oath, testified as follows:

That he was employed as a special agent of the telephone company; that he had access to and was in custody of records of the telephone company; that application for a license for Main 606 at Spokane was made by the Elite Cigar Store, S. 7 Stevens Street, Spokane, signed by R. J. Critzer; and that on the 7th day of November, 1923,

the Elite Cigar Store at S. 7 Stevens Street at Spokane, had for its telephone number, Main 606.

D. E. DUNNING, a witness called on behalf of the plaintiff, having been first duly sworn on oath, testified as follows:

That he is a city license inspector and secretary to the Commissioner of Public Safety at Spokane, Washington; that on April 25, 1923, application for soft drink license, for S. 7 Stevens Street, Spokane, was made by W. G. Critzer, and that it was signed W. G. Critzer by R. J. Critzer, and that a license was thereafter issued on May 1, 1923 to W. G. Critzer to conduct a soft drink business at S 7 Stevens Street, Spokane, Washington; that he had occasion to visit the place of business prior to and up to November 8, 1923, and that Grant Critzer was in charge of the place; that one of the brothers of W. G. Critzer is named Louie.

CLARENCE MARCY, a witness called on behalf of the plaintiff, having been first duly sworn on oath, testified as follows:

That he was police officer at Spokane, Washington; that the Elite Cigar Store is located at S. 7 Stevens Street, Spokane.

A. C. HENRY, a witness called on behalf of the plaintiff, having been first duly sworn on oath, testified as follows:

That he is prosecuting attorney of Boundary County, and was such on November 8, 1923; that

he was acquainted with a man named Hayden, he did not know his first name. The following occurred:

BY. MR. LANGROISE:

Q. Can you identify the Hayden you are acquainted with?

A. I can.

Q. Can you point him out?

A. The first one there (pointing at Critzer). That he saw the gentlemen referred to as the defendants together in a room at the Commercial Hotel in Bonners Ferry some time in November; that a man named Jones took him to the hotel, and that Jones said, "This man is in trouble"; that he looked over to him and said, "What are you in trouble about?" and he said, "I lost my car and I lost my booze down here at Deep Creek." On cross examination, the witness testified that he was not sure that he had ever seen the defendant Hayden before, and that he would not swear positively that he was the man, but he thought he was the man with Critzer at the Commercial Hotel; that he would swear positively as to the other man (Critzer).

BY MR. LAVIN:

Q. "Now, with reference to this gentleman here (indicating Critzer) did you ever see him before?"

A. Yes, sir.

Q. What did you say his name was?

A. I was introduced to him as Hayden, I don't know what his name is.

Q. He told you his name was Critzer, didn't he?

A. No sir.

Q. And that he was after a car seized up there by the officers.

A. He didn't tell me anything about the car that was seized.

Q. He told you he wasn't in the car at that time?

A. He did not.

Q. And demanded the return of the car?

A. He did not.

Q. And didn't you tell him the car ought to be returned to him?

A. I did not.

Q. Later it was turned over to the Federal officers?

A. I don't know about that.

No other evidence having been offered in behalf of the Government, counsel for the defendants made the following motion:

> MR. LAVIN: At this time, the Government having rested, the defendant Critzer challenges the sufficiency of the testimony and moves the Court to dismiss the three Counts of the Indictment as to the defendant Critzer, or to instruct the jury to return a verdict of Not Guilty on each and all of the counts for

the reason the evidence is not sufficient to justify submitting the case to the jury. I make the same motion with reference to the defendant Hayden in all particulars.

Thereupon, the defendants offered the following evidence:

FRANK KEENAN, a witness called on behalf of the defendants, having been first duly sworn on oath, testified as follows:

That he is a police officer in the City of Spokane, having been such for fourteen years; that he is acquainted with W. G. Critzer, one of the defendants. The following occurred:

BY MR. LAVIN:

Q. Are you acquainted with W. G. Critzer, one of the defendants in this case?

A. Yes sir.

Q. Did you have occasion to see him on the morning of the 8th of November, 1923?

MR. LANGROISE: We will admit that Mr. Critzer was in Spokane on that day.

MR. LAVIN: All right, on the morning of the 8th of November?

MR. LANGROISE: Yes.

MR. LAVIN: Early morning?

MR. LANGROISE: Yes.

MR. LAVIN: You don't contend that he was up at Bonners Ferry that day?

MR. LANGROISE: No sir.

RAY HAYDEN, one of the defendants, called

as witness for the defendants, having been first duly sworn on oath, testified as follows:

That he was living at Spokane on November 7, 1923, at the American Hotel, where he had been living from six to nine months prior to said date; that he was acquainted with W. G. Critzer, having met him before the trial of the case; that he had never operated the Hudson automobile referred to; that he was not driving said automobile on November 7 or November 8 in the vicinity of Moravia, or that he had never ridden or driven it before that time; that he had never been in the town of Bonners Ferry; that he had never seen the witness Henry who testified for the Government; that he had never talked to him at Bonners Ferry, and that he never was in Bonners Ferry with Mr. Critzer. On cross-examination, he testified that he was in Spokane on November 7, at the American Hotel, and that he was arrested two or three weeks after the time the car was confiscated near Bonners Ferry; that he followed the occupation of salesman, selling automobiles and trucks, but that he had not sold any automobiles or trucks for eighteen months, our particular trucks, a big truck, I remember, a 5½ ton truck, I sold to City of Spokane; that he worked for a time selling tires, but had not sold any for 18 months, and for a time as cigar clerk in the Court Cigar Store; and that he was not employed in November, and had not worked since June, 1923, and was laid

off on account of bad health; that a few days after the automobile in question was seized, he heard it talked of around Spokane; that he lived at the American Hotel all of the time and slept at the hotel on the night of November 7, 1923; that he never was at Moravia; that he knew W. G. Critzer prior to November 7, 1923, slightly.

W. G. CRITZER, one of the defendants, called as witness in behalf of the defendants, having been first duly sworn on oath, testified as follows:

That he has two brothers, named R. J. Critzer and L. E. Critzer; that R. J. Critzer, who made application for the license for the Elite Cigar Store at Spokane, is a brother of the witnes; that he operated the Elite Cigar Store at Spokane until the first of July, when he went to California, and came back and never operated it afterwards that he came back on the 18th of August, 1923; that he is acquainted with his co-defendant, Ray Hayden, and that on November 7th or 8th, he did not lend the car in question to Hayden and did not permit him to drive it and never knew of him having driven that car; that he first learned that the car had been seized about ten o'clock in the morning of November 8, the information being given to him by Frank Keenan, detective in the City of Spokane; that he was not out of Spokane at any time on the 7th or the morning of the 8th; that he was not driving the automobile in question in the vicinity of Bonners Ferry, and had not driven

it there; that after he had been informed that his car had been seized, he went to the John Doran Company of Spokane who had a mortgage on the car, and that in company with the book keeper of that firm, he went to Bonners Ferry, Idaho and talked with Mr. Henry, Prosecuting Attorney; that Ray Hayden was not with him at that time, and that he had never seen Mr. Henry before that time; That he knew Mr. Henry was Prosecuting Attorney; that he told Mr. Henry that the car had been seized, and that the John Doran Company had a mortgage, and that Henry asked him if he brought the papers with him, and that he said he would go back to Spokane and bring them up; that he did not tell Henry that he had lost his car and booze, and that he did not know that was being driven with intoxicating liquor at that time. On cross-examination, he testified that a man by the name of Martin B. Ackerman, a man whom he had met in Montana in 1917 when they were working in the woods was driving the car at the time in question; that he had known Ackerman for some time, but that he had never had any business relations with him; that Ackerman had been in Spokane for about a month and roomed right around the corner from his place, that Ackerman wasn't doing anything, would see him nearly every night—used to ride home with me from uptown. That Ackerman told him that he was going hunt-

ing and that the witness let him take the car on the morning of the 7th.

Q. Where was Ackerman living at that time?

A. I am pretty sure he was living at the Montana Hotel.

Q. Don't you know?

A. Well he moved out of there—I don't know whether he was living there or at the Empire—he used to ride to the garage with me then he went home—pretty sure it was the Montana Hotel.

Q. He was living there at that time?

A. Yes.

Q. And he never returned afterwards?

A. I never saw him.

Q. You never made inquiries as to where he was?

A. I tried to find out—there wasn't many people knew him around there.

Q. What was the other place you named?

A. Empire hotel.

Q. You know he stayed at those places?

A. He stayed at the Empire first and the Montana last.

Q. You made inquiries right after this?

A. Yes.

Q. Did he say how long he wanted the car?

A. Yes, he said he would be back the next day sometime.

That he did not know that his automobile was being used for hauling whiskey; that he had driven

the car eight thousand miles during the four months that he owned it, but that he had driven it to California and back; that Ackerman had never communicated with him after the car had been seized; me and my wife had the Big Bend Hotel; that he owned the Elite Cigar Store at Spokane during the year 1923; that he opened up for business in April and left about the middle of June for California and came back about August 20; that he sold his interest in the cigar store—a one-half interest; that the telephone number of the store was Main 606; that his brothers looked after the place of business. Was in taxi business from spring 1919, to 1921, not before or since. Sold cars year when I had chance, not a salesman but worked on commission.

HARRY HAYDEN, a witness called on behalf of the defendant, having been first duly sworn on oath, testified as follows:

That he is a brother of Ray Hayden, one of the defendants; that his brother was living at the American Hotel at Spokane during the month of November, 1923, and had been living there for about nine months; that his brother, Ray Hayden, defendant, was around Spokane during the early part of November about the time he was arrested, but that he did not know where he was on November 7 or 8.

W. G. CRITZER, recalled by the defendant, testified as follows:

That a Mr. Bray, bookkeeper for John Doran Company at Spokane, was with him at Bonners Ferry; that he returned to Bonners Ferry; talked with Henry and showed him papers; and that the other man was a Mr. Jones from Sandpoint.

A. C. Henry was recalled on rebuttal and testified as follows:

That Critzer never did come to his office, but that a man representing some automobile concern in Spokane came alone to his office a few days after the conversation in the hotel with Critzer, Jones and another man. That there is no man by the name of Larson running a pool hall in Bonners Ferry. That the other man that was with Critzer in the hotel resembles the man in the center (being defendant Hayden), but I would not be positive.

CROSS EXAMINATION:

That he was prosecuting attorney of Boundary County, and that he had not had the defendant Critzer arrested; that the case had been turned over to the U. S. Authorities and that relieved him.

Thereupon, respective counsel argued to the jury, after which argument, the court instructed the jury, and in addition to general instructions, gave an instruction in substantially the following language:

> That the jury must find from the evidence, beyond a reasonable doubt, before they can find the defendant Critzer guilty, that some relationship existed between the defendant

Critzer and the defendant Hayden or other driver of the car; that either Hayden, or some other driver, was employed by Critzer for or on a contingent basis for transporting said intoxicating liquor, or had joint interest in the transaction, or the defendant Critzer employed him to transport the intoxicating liquor in question, or that Critzer had knowledge that said liquor was to be transported in said car and furnished his car for the unlawful enterprise, or that he was aided and assisted by the defendant Hayden, or such other driver, in transporting said intoxicating liquor; and that unless the jury find such facts to exist from the evidence, beyond a reasonable doubt, then they must find the defendant Critzer not guilty.

Thereafter, the jury retired to consider their verdict, and returned a verdict finding the defendant Ray Hayden not guilty on the three counts of the Indictment, and finding the defendant W. G. Critzer guilty on the three counts of the Indictment.

Duly settled and allowed as defendant Critzer's Bill of Exceptions.

FRANK S. DIETRICH,
Judge.

February 28, 1925.

Endorsed:

Lodged January 16, 1925.

Filed February 28, 1925.

W. D. McREYNOLDS, Clerk

By M. FRANKLIN, Deputy.

(Title of Court and Cause)

VERDICT.

We, the jury in the above entitled cause, find the defendant W. G. Critzer Guilty on the first count, Guilty on the second count, and Guilty on the third count as charged in the information.

We find the defendant Ray W. Hayden, Not Guilty on the first count, Not Guilty on the second count and Not Guilty on the third count as charged in the information.

J. C. WADDELL, Foreman.

Endorsed, Filed December 6, 1924.

W. D. McReynolds, Clerk.

(Title of Court and Cause)

MOTION IN ARREST OF JUDGMENT.

Comes now the defendant, W. G. Critzer, and moves the Court for an order vacating, setting aside, the verdict of the jury, heretofore rendered and entered herein, finding the defendant guilty upon counts 1, 2, and 3 of the Information herein, and to grant a judgment of dismissal, and to set aside said verdict upon the ground and for the reasons:

I.

That said verdict is inconsistent with the facts; inconsistent with the evidence adduced in the trial

of said cause, and inconsistent with the Court's instructions, given at the time of trial.

II.

That under the theory of the government, as alleged in the Information, and as announced during the course of trial, and as submitted to the jury under instruction of the Court, a verdict finding the defendant, Ray Hayden, not guilty on all of the counts of said indictment is the same as the verdict finding the defendant Critzer not guilty.

III.

That the cause having been submitted to the jury upon the theory that Hayden was actually driving the car in question at the time alleged, and was conveying intoxicating liquor from some point in Canada to some point in the United States, and the car became stuck or lodged and the intoxicating liquor was taken therefrom, and the Government having admitted that the defendant Critzer was not present in person at the time, but was in Spokane, and the Court having instructed the jury that the jury could not convict the defendant Critzer even though they found he was the owner of the car in question, but that they might consider the ownership of the car as bearing upon the question of whether of not he was participating in the transportation of said intoxicating liquor, having found that the defendant Hayden was not in possession of the said intoxicating liquor alleged,

and was not transporting such intoxicating liquor in the car which it was conceded belonged to the defendant Critzer, a verdict finding the defendant Hayden not guilty is inconsistent with, absurd, and repugnant to the verdict of the jury finding he defendant Critzer guilty as charged.

IV.

Said verdict is further inconsistent in that the court instructed the jury substantially that the jury must find from the evidence, beyond a reasonable doubt, before they can find the defendant Critzer guilty, that some relationship existed between the defendant Critzer and the defendant Hayden; that either Hayden was employed by Critzer, for some consideration for or on a contingent basis, for the transporting of the said intoxicating liquor; that the defendant Critzer and the defendant Hayden had joint partnership in the transaction, or that the defendant Critzer employed the defendant Hayden to transport the intoxicating liquor in question, or that Critzer had knowledge that the said liquor was to be transported in the car, or that he aided and assisted in the transportation of the said intoxicating liquor, and unless the jury find such fact or facts to exist from the evidence, beyond a reasonable doubt, they must find the defendant Critzer not guilty.

V.

The District Attorney, during the reception of the evidence when the defendant Critzer offered evidence to show he was not present at the time of the alleged commission of the offense, and during the argument, conceded that Critzer was not personally present at the time and place alleged, but that he was in Spokane, Washington.

VI.

The jury, having found by its verdict that the defendant Hayden was not guilty of the possession or transportation of liquor referred to in counts 1 and 2 of the Information, and that he did not possess or transport intoxicating liquor in the car in question, admitted to be the property of the defendant Critzer, then the defendant Critzer did not aid or assist the defendant Hayden; could not have had any agreement or arrangement with reference to the possession or transporting of any intoxicating liquor (the jury having found Hayden did not possess or transport any intoxicating liquor); that Hayden was not employed by Critzer for a consideration, or otherwise, for the possession or transportation of the intoxicating liquor referred to in the Information, and Critzer could not have knowledge that such intoxicating liquor was possessed or transported by Hayden in his car, which the jury found Hayden did not possess or transport, and a verdict finding Critzer guilty and the defendant Hayden not guilty is inconsistent,

absurd, repugnant to and contrary to the law and the Court's instructions, and not justified by the evidence and contrary to the evidence, the court's instructions, and the theory of the Government, as alleged in the information, and as stated and argued by the District Attorney.

VII.

That before the defendant Critzer could be found guilty, the jury was bound to find the defendant Hayden guilty of possession and transporting intoxicating liquor, as in the Information, in the automobile belonging to the defendant Critzer.

This Motion is made and based upon the files and proceedings herein, upon the reporter's notes and the transcript of evidence, the arguments of counsel, and the instructions of the court.

And, in the alternative, and in the event that said Motion should be denied, and not otherwise, then the defendant Critzer moves the court to vacate and set aside the verdict of the jury, and to grant a New Trial for the defendant Critzer upon the ground and for the reason:

I.

Insufficiency of the evidence to justify the verdict of the jury, and that the same is against the law and the facts.

II.

Errors in law occurring at the time of the trial and accepted to at the time by the defendant Critzer.

Dated at Spokane, Washington, this 8th day of December, A. D., 1924.

JOSEPH J. LAVIN,
Attorney for Defendant,
W. G. Critzer.

(Service acknowledged)

Endorsed, Filed December 9, 1924.
W. D. McREYNOLDS, Clerk.

(Title of Court and Cause)

ORDER.

This matter coming on for hearing upon the Motion of the defendant W. G. Critzer, in arrest of judgment, and for judgment notwithstanding the verdict of the jury, and for a New Trial, and after hearing the argument of counsel, and the court being fully advised in the law and the premises.

IT IS ORDERED, that said Motions, and each and all thereof, be, and the same are hereby overruled, to which ruling the defendant Critzer excepts and exception is allowed.

Done in open court this 10th day of December, A. D., 1924.

FRANK S. DIETRICH
Judge.

Endorsed, Filed Dec. 11, 1924.
W. D. McREYNOLDS, Clerk.

JUDGMENT.

At a stated term of the District Court of the United States for the District of Idaho, Northern Division, held in Coeur d'Alene, within said District, on December 9, 1924, the following proceedings, among others, were had, to-wit:

Present: HONORABLE FRANK S. DIETRICH,
Judge.

(Title of Court and Cause)

The defendant was duly informed by the Court of the nature of the information filed against him for the crime of Violation of the National Prohibition Act committed on the 7th day of November, 1923, of his arraignment and plea of not guilty on the 26th day of November, 1923, his trial and the verdict of the jury on the 6th day of December, 1924, "Guilty as charged on the first three counts of the information."

The defendant was then asked by the Court if he had any legal cause to show why judgment

should not be pronounced against him, to which he replied that he had none, and no sufficient cause being shown or appearing to the Court,

Now, therefore, the said defendant having been convicted of the crime of Violation of the National Prohibition Act,

It is hereby considered and adjudged that the said defendant W. G. Critzer do pay a fine of $250.00 and $500.00 and be confined in the Jail of Kootenai County, Idaho, until such fine is paid. Stay of execution of this judgment was granted for one day. Thirty days were allowed the defendant for filing Bill of Exceptions herein.

(Title of Court and Cause)

ORDER EXTENDING TIME FOR FILING BILL OF EXCEPTIONS.

Upon application of the defendant, W. G. Critzer, one of the defendants, for an order extending the time for the filing of a proposed Bill of Exceptions herein, and the court being fully advised,

IT IS ORDERED that the defendant W. G. Critzer be, and he is hereby given to and until January 9, 1925, within which to prepare, serve and file a proposed Bill of Exceptions herein.

Done in open court this 10th day of December, A. D. 1924.

FRANK S. DIETRICH,
Judge.

Endorsed, Filed December 11, 1924.
W. D. McREYNOLDS, Clerk.

(Title of Court and Cause)

PETITION FOR WRIT OF ERROR.

Comes now the defendant W. G. Critzer, defendant herein, and respectfully shows: That heretofore and on December 9th, 1924, this Court entered sentence and judgment against the defendant, W. G. Critzer, in which judgment and proceedings had hereunto in this cause, certain errors were committed to the prejudice of the defendant, all of which will appear more in detail from the assignment of errors, which is filed with this petition.

WHEREFORE, the said defendant, W. G. Critzer, prays that a writ of error may issue in his behalf out of the United States Circuit Court of Appeals for the Ninth Circuit, for the correction of the errors complained of, and that this Court fix a bond to operate also as a supersedeas, and that a transcript of the record, proceedings and

papers in said cause, duly authenticated, may be sent to the said Circuit Court of Appeals.

JOSEPH J. LAVIN,
Attorney for Defendant,
W. G. Critzer.

(Service admitted)

Endorsed, Filed, Dec. 11, 1924.
W. D. McREYNOLDS, Clerk.

(Title of Court and Cause)

ORDER ALLOWING WRIT OF ERROR.

On this 10th day of December, A. D., 1924, came the defendant W. G. Critzer, praying for the issuance of a writ of error upon his petition filed and presented herein, and filed therewith his assignment of errors, intended to be urged by him, and prayed for the fixing of a bond to be given to operate as a supersedeas and stay bond, and also that a record by way of transcript of all of the proceedings, papers and record upon which sentence and judgment herein was rendered and entered, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Ninth Judicial Circuit, and for such other and further proceedings may be had as may be proper in the premises:

In consideration WHEREOF, the Court does allow the said writ of error, and the bond for

such writ of error, and also to operate as a supersedeas, is fixed in the sum of One Thousand ($1,000.00) Dollars, and upon the defendant giving such bond, all proceedings to enforce such sentence and judgment shall be stayed until such writ of error is determined.

Done in open court this 10th day of December, A. D., 1924.

FRANK S. DIETRICH,
United States District Judge.

(Service admitted.)

Endorsed, Filed Dec. 11, 1924.
W. D. McREYNOLDS, Clerk

(Title of Court and Cause)

ASSIGNMENT OF ERRORS.

Comes now the above named defendant, W. G. Critzer, and in connection with the defendant's writ of errors and appeal herein, makes the following assignments of error, committed during the above entitled cause, and avers that such error is as follows:

I.

The court erred in refusing to grant the Motion of the defendant W. G. Critzer, made at the conclusion of the evidence of the Government, challenging the sufficiency of the evidence to justify the same being submitted to the jury.

II.

The Court erred in overruling the defendant's Motion for judgment and acquittal, notwithstanding the verdict of the jury.

III.

The Court erred in overruling the defendant's motion for Arrest of Judgment.

IV.

The Court erred in overruling the defendant's Motion for New Trial.

V.

The Court erred in entering judgment upon the verdict of the jury and in sentencing the defendant upon the verdict of the jury.

VI.

The Court erred in overruling the defendant's Motion in Arrest of Judgment, for judgment and acquittal, and for New Trial, and in entering judgment upon the verdict, and in refusing to set said verdict aside upon the ground and for the reason; that the verdict of the jury, finding the defendant Hayden not guilty and the defendant Critzer guilty, was absurd, repugnant to the verdict of the jury, and inconsistent.

JOSEPH J. LAVIN,
Attorney for Defendant,
W. G. Critzer

(Service admitted)

Endorsed, Filed Dec. 11, 1924.
W. D. McREYNOLDS, Clerk.

(Title of Court and Cause)

BOND ON APPEAL.

KNOW ALL MEN BY THESE PRESENTS, that we, W. G. Critzer, the defendant above named, as principal, and the National Surety Company, a corporation (organized under the laws of the state of New York, and authorized to and transacting business as surety in the State of Washington), as surety, are jointly and severally held and firmly bound unto the United States of America in the penal sum of One Thousand ($1000.00) Dollars ($1000.00) for the payment of which well and truly to be made, we bind ourselves, our heirs, executors, and administrators, successors, and assigns, jointly and severally, firmly by these presents.

Dated at Spokane, Washington, this 10th day of December, A. D., 1924.

The condition of the foreging obligation is such that,

WHEREAS, the above bounden, W. G. Critzer, was heretofore charged by an information filed in the above entitled court with the offense of unlawfully possessing and transporting intoxicating liquor, and,

WHEREAS, heretofore, and on, to-wit: the 6th day of December, 1924, the said defendant, W. G. Critzer, was found guilty upon counts 1 and 2 of the information charging him with the unlawful

possession and transportation of intoxicating liquor, and,

WHEREAS, heretofore and on, to-wit: the 9th day of December, 1924, the above entitled court imposed judgment upon the verdict of the jury and sentenced the said defendant, W. G. Critzer, the principal herein, to pay a fine of Two Hundred and Fifty ($250.00) Dollars upon the first count of the Information, and the further sum of Five Hundred ($500.00) Dollars upon the second count of the said Information, a total of Seven Hundred and Fifty ($750.00) Dollars; and that upon failure to pay said fine, he be confined in the county jail of Kootenai County, Idaho, and,

WHEREAS, the above bounden has petitioned for, and a Writ of Error has been allowed, and upon said Writ of Error he has been required to furnish a bond in the sum of One Thousand ($1000.00) Dollars, conditioned that he shall pay said sum of Seven Hundred and Fifty ($750.00) Dollars on the determination of the proceedings on the Writ of Error, or upon failing to do so, that he shall surrender himself or be surrendered to the sheriff of Kootenai County, Idaho to abide by and obey the order and judgment of said court.

NOW THEREFORE, if the said W. G. Critzer, said defendant herein, upon whose application a Writ of Error has been allowed, shall be and appear in the District Court of the United States,

the District of Idaho, Northern Division, upon the determination of said proceedings on said Writ of Error, in the event said Judgment be affirmed, and shall, upon the determination thereof, pay said fine of Seven Hundred and Fifty ($750.00) Dollars, and shall fully satisfy and perform any and all orders, judgments, or mandates that may be entered in said cause, then this obligation to be void, otherwise to be and remain in full force and effect.

W. G. CRITZER,
By Joseph J. Lavin,
His Attorney.
NATIONAL SURETY COMPANY, a corporation,
By Arthur Oppenheimer,
Resident Vice President and
S. A. Mitchell, Resident Assistant Secretary.

(CORPORATE SEAL)

I hereby approve the above Bond.
FRANK S. DIETRICH,
United States District Judge.

Endorsed, Filed December 11, 1924.
W. D. McREYNOLDS, Clerk.

(Title of Court and Cause)

WRIT OF ERROR.

The President of the United States to the Honorable Judge of the District Court of the United States for the District of Idaho, Northern Division. GREETING:

Because of the records and proceedings, as also in the rendition of the judgment and sentence on a plea, which is in the said District Court before you, or some of you, between the United States or America, plaintiff, and the defendant, W. G. Critzer, above named, manifest error hath happened to the great damage of the said defendant W. G. Critzer, as by his complaint appears, and it being fit and proper that the error, if any hath happened, shall be duly corrected, and full and speedy justice done to the party aforesaid in this behalf duly command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the records and proceedings, aforesaid, with all things concerning the same to the United States Circuit Court of Appeals for the Ninth Judicial Circuit, together with this writ, so that you may have the same at the city of San Francisco, in the State of California, within thirty days from the date of this writ in the said Circuit Court of Appeals, to be then and there held, that the records and proceedings aforesaid, being inspected, this said Circuit Court of Appeals may

cause further to be done therein to correct that error what of right and according to the law and custom of the United States should be done.

WITNESS the Honorable WILLIAM HOWARD TAFT, Chief Justice of the Supreme Court of the United States, this 10th day of December, A. D., 1924.

W. D. McREYNOLDS,
Clerk of the United States District Court for the District of IDAHO, NORTHERN DIVISION.

(SEAL)

(Service admitted)

Endorsed, Filed Dec. 11, 1925.
W. D. McREYNOLDS.

(Title of Court and Cause)

CITATION ON WRIT OF ERROR.

The President of the United States, to the United States of America, and to Messrs. E. G. Davis and William H. Langroise, Your attorneys:

GREETING:

You are hereby cited and admonished to be and appear in the United States Circuit Court of Appeals for the Ninth Circuit, to be held at the city of San Francisco, in the State of Cali-

fornia, within thirty days from the date of this writ, pursuant to a writ of error, regularly issued, and which is on file in the office of the clerk of the District Court of the United States, for the District of Idaho, Northern Division, in an action pending in said court, wherein W. G. Critzer is plaintiff in error (defendant in the lower court), and the United States of America is defendant in error (plaintiff in the lower court), and to show cause, if any there be, why the judgment in said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

WITNESSS the Honorable WILLIAM HOWARD TAFT, Chief Justice of the Supreme Court of the United States of America, this 10th day of December, A. D., 1924.

FRANK S. DIETRICH,
U. S. District Judge.

(SEAL)

Attest: W. D. McREYNOLDS,
Clerk of said Court.

Copy received 12-11-24.
JAMES F. AILSHIE, Jr.,
Asst. U. S. Attorney.

Endorsed, Filed December 11, 1924.
W. D. McREYNOLDS, Clerk.

(Title of Court and Cause)

PRAECIPE.

TO THE HONORABLE W. D. McREYNOLDS, Clerk of the above entitled court:

You will please prepare, certify and transmit to the Clerk of the United States Circuit Court of Appeals, for the Ninth Circuit, holding terms at San Francisco, California, and include therein the following papers as a part of the record in the above entitled cause, the same to be printed by said clerk of said Circuit Court of Appeals in the ordinary and usual method.

1. Information or Indictment.
2. Bill of Exceptions.
3. Verdict of Jury.
4. Motion in arrest of Judgment, and Motion for New Trial.
5. Order overruling and denying Motion in Arrest of Judgment and for New Trial.
6. Judgment and Sentence.
7. Petition for Writ of Error.
8. Order allowing Writ of Error.
9. Citation on Writ of Error.
10. Bail Bond in Error. (Included in Bond on Writ of Error.)
11. Assignment of Errors.
12. Order granting extension of time for filing proposed Bill of Exceptions and fixing supersedeas bond. (Included in No. 8).

13. Bond on Writ of Error.

14. Writ of Error.

15. Certificate of Judge to Bill of Exceptions.

16. Certificate of Clerk of the United States District Court to Transcript of Record.

17. Names and addresses of attorneys of record.

18. Order Extending Time for Filing proposed Bill of Exceptions from January 9 to January 19, 1925.

19. Journal entries of record on day of trial.

JOSEPH J. LAVIN,
Attorney for Defendant,
W. G. Critzer.

Endorsed, Filed January 16, 1925.
W. D. McREYNOLDS, Clerk.
By M. FRANKLIN, Deputy.

(Title of Court and Cause)

CLERK'S CERTIFICATE.

I, W. D. McReynolds, Clerk of the District Court of the United States for the District of Idaho, do hereby certify the foregoing transcript of pages numbered from 1 to 55, inclusive, to be full, true and correct copies of the pleadings and proceedings in the above entitled cause, and that the same together constitute the transcript of the record herein upon Writ of Error to the United States

Circuit Court of Appeals for the Ninth Circuit, as requested by the praecipe filed herein.

I further certify that the cost of the record herein amounts to the sum of $70.25, and that the same has been paid by the plaintiff in Error.

Witness my hand and the seal of said Court this 13 day of April, 1925.

(SEAL) W. D. McREYNOLDS, Clerk.

IN THE

United States

Circuit Court of Appeals

FOR THE NINTH CIRCUIT

W. G. CRITZER,
Plaintiff in Error,
vs.
UNITED STATES OF AMERICA,
Defendant in Error.

BRIEF OF PLAINTIFF IN ERROR.

Upon Writ of Error from the United States District Court for the District of Idaho, Northern Divison.

JOSEPH J. LAVIN,
Attorney for Plaintiff in Error,
Spokane, Washintgon.

THE FRANKLIN PRESS, SPOKANE

IN THE

United States

Circuit Court of Appeals

FOR THE NINTH CIRCUIT

W. G. CRITZER,
Plaintiff in Error,

vs.

UNITED STATES OF AMERICA,
Defendant in Error.

BRIEF OF PLAINTIFF IN ERROR.

Upon Writ of Error from the United States District Court for the District of Idaho, Northern Divison.

JOSEPH J. LAVIN,
Attorney for Plaintiff in Error,
Spokane, Washintgon.

THE ISSUES.

On November 21, 1923, the United States Attorney for the District of Idaho filed an Information in the Northern Division of the District Court for the District of Idaho, charging the defendants W. G. Critzer and Ray W. (John Doe) Hayden with a violation of the National Prohibition Act (Tr. 10). The Information contains three counts. The first count charged the defendants with the unlawful possession of a quantity of intoxicating liquor; the second count, the unlawful transportation of the identical liquor referred to in the first count; and the third count, a libel against the automobile in which the intoxicating liquor referred to in the first and second counts, was alleged to have been transported.

The case came on regularly for trial, and the jury returned a verdict of guilty as to the defendant Critzer on all of the counts, and a verdict of not guilty on all the counts as to the defendant Hayden (Tr. 16).

Thereafter, the defendant Critzer seasonably filed a Motion in Arrest of Judgment, and, in the alternative, for a New Trial (Tr. 35), which Motions were denied (Tr. 40), and exception allowed (Tr. 40). Judgment was thereupon entered upon the verdict of the jury, and the defendant Critzer was ordered to pay a fine of Two Hundred and Fifty ($250.00)

Dollars on the first count, and Five Hundred ($500.00) Dollars on the second count (Tr. 41-42), from which judgment and sentence, this Writ of Error is prosecuted upon the Assignments of Error heretofore filed (Tr. 45-46), which said Assignments of Error are as follows:

I.

The Court erred in refusing to grant the Motion of the defendant W. G. Critzer, made at the conclusion of the evidence of the Government, challenging the sufficiency of the evidence to justify the same being submitted to the jury.

II.

The Court erred in overruling the defendant's Motion for judgment and acquittal, notwithstanding the verdict of the jury.

III.

The Court erred in overruling the defendant's Motion in Arrest of Judgment.

IV.

The Court erred in overruling the defendant's Motion for New Trial.

V.

The Court erred in entering judgment upon the verdict of the jury and in sentencing the defendant upon the verdict of the jury.

VI.

The Court erred in overruling the defendant's Motion in Arrest of Judgment, for judgment of acquittal, and for New Trial, and in entering judgment upon the verdict, and in refusing to set said verdict aside upon the ground and for the reason that the verdict of the jury, finding the defendant Hayden not guilty and the defendant Critzer guilty, was absurd, *repugnant to the verdict of the jury,* and inconsistent.

THE FACTS.

On November 7, 1923, Deputy Sheriffs of Bonner County, Idaho, having received information that intoxicating liquor was being transported through that county by automobiles, drove to a point near Deep Creek, a few miles distant from the county seat. They erected a barrier across the roadway and secreted themselves nearby. About 4:00 o'clock, the following morning, three automobiles approached. The first car "jumped" the barrier and proceeded westerly out of view. The second car did likewise, and the third car turned quickly and went easterly. They followed the third car easterly some distance, but were unable to overtake it. They then returned to a point a short distance west of the point where they had placed the barrier, and found an automo-

bile which had left the traveled portion of the roadway, settled into a soft, marshy portion of the roadway, and one of the rear wheels marooned against a log. They did not see the driver, who had deserted the car. A large quantity of intoxicating liquor, in sacks, was lying upon the ground near the automobile, two of the sacks of liquor resting against the running board of the car. The car was a Hudson speeder, and bore a leather tag holder on the dashboard, containing the name of W. G. Critzer, of Spokane, and was the property of the defendant, W. G. Critzer. Shortly thereafter, a man called at a telephone office at Moravia, a station on the Great Northern Railway Company line, about four miles distant from the point where the automobile was found, and requested of the lady in charge of the telephone office that he be permitted to use the telephone (Trans. 211). She testified the man said his name was Hayden, and he desired to call Main 606 at Spokane. She could not identify the man who placed the call (Trans. 22). A daughter of the telephone operator testified that the man giving the name of Hayden, after calling the number, Main 606, said: "Is this 'home'?" and he said, "Tell Joe I have lost everything. Will be in on 43." And he further said, "Look out for Grant." (Tr. 23.) The man's clothes were damp, and he spoke about

coming through wet grass and weeds (Tr. 23); she could not identify the person placing the call (Tr. 23). An employee of the telephone company testified that the records at Spokane showed that the telephone number, Main 606, was issued to S. 7 Stevens Street, Spokane, upon the application of R. J. Critzer, under the name of Elite Cigar Store (Tr. 23). D. E. Dunning, City License Inspector of Spokane, testified that a license for the Elite Cigar Store was issued April 25, 1923, to W. G. Critzer, the application being signed, "W. G. Critzer, by R. J. Critzer."

At the conclusion of the Government's case, there being no evidence that the defendant Hayden was ever seen in or about the automobile in question, and no evidence that he had ever possessed or transported the intoxicating liquor in question, the defendant requested the Court to instruct the jury to return a verdict of not guilty, which motion, the Court denied. At the same time, the same motion was made in behalf of the defendant Critzer, there being no evidence that he ever possessed or transported the liquor in question, and no evidence against him of any character saving and excepting that the automobile in question belonged to him.

The jury, having found the defendant Hayden not guilty on all counts of the Information, and the de-

fendant Critzer guilty on all of the counts, the evidence will be discussed only in so far as it concerns the defendant Critzer. We ask counsel to refer to any part of the evidence offered by the Government as a part of its case to justify the submission of the question of the guilt of Critzer to the jury. Mere ownership of the automobile in question was not sufficicnt. Suppose that Critzer had been sued for damages for injuries sustained by a person, and the plaintiff offered no evidence against him saving and excepting that a car owned by him, or bearing a license issued in his name, had caused the injury, and that there was no evidence as to who was driving the car at the time. Would such conduct be sufficient to put him to his proof. And if such rule exists in a civil action, does it not apply with equal, if not greater force, in a criminal action? The Government alleged in the information that Hayden and Critzer possessed and transported the liquor in question. The jury, by its verdict, found that Hayden did not possesse nor transport the liquor, but that Critzer did. But even though it be assumed that proof that the license upon the automobile in question, found upon the car, and the driiver's license stood in the name of W. G. Critzer, and that such facts gave rise to the presumption, without any evidence upon the subject, that the W. G. Critzer there

referred to was the defendant W. G. Critzer, and that the Court, in passing upon the motion for directed verdict, was justified in presuming that no one but the defendant W. G. Critzer was the driver of the car, your Honors' attention is respectfully directed to the record (Tr. 27) where will be found an admission made by the Government that Critzer was not driving the car; was not in the vicinity of Bonners Ferry at the time in question, but was at Spokane at the time of the seizure of the car and its contents (Tr. 27). This admission was made when the defendant sought to offer evidence that he had nothing to do with the possession or transportation of the liquor in question. Having in mind that the Government was entitled to the benefit of any evidence favorable to it offered by the defendant, after the denial of the motion, the record discloses positive and undisputed evidence that he was not driving the car in question, but was in Spokane all the time (Tr. 27); that he had no knowledge his car was being used for the transportation of liquor (Tr. 31); that he had no interest in the Elite Cigar Store, S. 7 Stevens Street, Spokane, nor the telephone number, Main 606 (Tr. 32); that he sold his interest in the Cigar Store in June, 1923, to a brother, R. J. Critzer, and went to California, and returned to Spokane in August, 1923.

Upon the facts, as herein contained, where is there any evidence that justified the jury in finding that the defendant Critzer possessed or transported the liquor in question? If there be such evidence, or any circumstances of any kind, counsel for the defendant in error should make reference to it in their brief.

ARGUMENT.

The Assignments of Error will be found at pages 45-46 of the Transcript. They embrace the error in the denial of the motion for a directed verdict at the conclusion of the Government's case; the denial of the motion for a judgment of acquittal, notwithstanding the verdict of the jury; the denial of the Motion for a New Trial; and the question of the inconsistency of the verdict, for the reason that the Government having alleged and having contended that Hayden was driving the car as the agent of the defendant Critzer, a verdict finding that the defendant Hayden did not possess and did not transport the intoxicating liquor, or finding him not guilty, renders the verdict of guilty as against the defendant Critzer inconsistent.

These Assignments of Error will be discussed separately in the order of their assignment.

I.

THE COURT ERRED IN REFUSING THE MOTION OF THE DEFENDANT CRITZER, MADE AT THE CONCLUSION OF THE GOVERNMENT'S EVIDENCE FOR A DIRECTED VERDICT OF NOT GUILTY BECAUSE OF THE INSUFFICIENCY OF THE EVIDENCE. (Tr. 26.)

As heretofore suggested, there was no evidence whatever offered against the defendant Hayden. No witness testified that he was ever seen in or about the automobile in question. The only evidence against the defendant Critzer was that an automobile bearing a license number issued to him, and a driver's license bearing the name of W. G. Critzer, was found upon an automobile beside the roadway near Bonners Ferry, Idaho, over one hundred miles distant from Spokane. No witness testified, and no evidence was offered that Critzer was ever seen in or about the automobile, and the Government made no contention that Critzer was driving the car, or that he was in or about the car, but conceded that at the time of the seizure of the car, Critzer was in Spokane. Under the law, the presumption is that he was not guilty. A mere statement of the facts, making such statement most favorable to the Government, will immediately bring one to the conclu-

sion that the Court must hve reached the conclusion that the mere fact that the automobile in question bore the license number issued to one W. G. Critzer, was sufficient to justify the presumption that the W. G. Critzer referred to was the defendant, W. G. Critzer, and put the burden upon the defendant of establishing his innocence. As we have heretofore suggested, mere proof of the ownership of the car in question would not make the defendant liable in a civil action, nor in a criminal action, and the motion should have been granted.

Assignment 2, 3, and 4 (Tr. 46), raise practically the same question as has been discussed under the foregoing assignment, and the argument there made is peculiarly applicable to these assignments. There was no evidence of any kind or character offered against the defendant Critzer, saving and excepting proof of the ownership of the car, and the Court should have granted the defendant's motion in arrest of judgment and should have granted a New Trial, both of which were presented to the Court and overruled (Tr. 40).

VI.

THE COURT ERRED IN OVERRULING THE DEFENDANT'S MOTION IN ARREST OF JUDGMENT, FOR JUDGMENT OF ACQUITTAL, AND

FOR NEW TRIAL, AND IN ENTERING JUDGMENT UPON THE VERDICT, AND IN REFUSING TO SET SAID VERDICT ASIDE UPON THE GROUND AND FOR THE REASON; THAT THE VERDICT OF THE JURY, FINDING THE DEFENDANT HAYDEN NOT GUILTY AND THE DEFENDAN CRITZER GUILTY, WAS ABSURD, REPUGNANT TO THE VERDICT OF THE JURY, AND INCONSISTENT.

It is contended under this assignment of error that the Court should have set the verdict aside for the reason that the verdict of the jury, finding the defendant Ray W. Hayden not guilty, and finding the defendant W. G. Critzer guilty, is inconsistent (Tr. 35). The Information, as will be observed (Tr. 11-13), charged the defendants Ray W. Hayden and W. G. Critzer with the unlawful possession and transportation of intoxicating liquor in the automobile hereinbefore referred to, and it was contended by the Government that the defendant Hayden was the driver of the automobile in question, and, as such, acted as the agent of and for, and in behalf of the defendant Critzer, either under some terms of employment or upon a contingent basis, or that the defendant Hayden and the defendant Critzer had a joint partnership for the purpose of transporting the liquor, or that the defendant Critzer

had employed the defendant Hayden to transport the intoxicating liquor in question; and these facts, the Government stated they would establish by evidence, and these facts they sought to establish by their evidence, and the Court instructed the jury that unless they found, from the evidence, beyond a reasonable doubt, that the Government had established these facts, then the jury should return a verdict of not guilty as to the defendant Critzer. The instruction given by the Court upon this subject, was as follows (Tr. 33 and 34):

> "The Court erred in overruling the defendant's Motion in Arrest of Judgment, for judgment and acquittal, and for New Trial, and in entering judgment upon the verdict, and in refusing to set said verdict aside upon the ground and for the reason: that the verdict of the jury, finding the defendant Critzer guilty, was absurd, repugnant to the verdict of the jury, and inconsistent."

The Government, having contended that the venture in question was a joint venture between the defendants Hayden and Critzer, and Court having instructed that before the defendant Critzer could be found guilty, that the jury would be bound to find, from the evidence, beyond a reasonable doubt, that some relationship existed between Hayden and Critzer, either upon the theory of employment or upon the theory of agency, and the jury, having found that the defend-

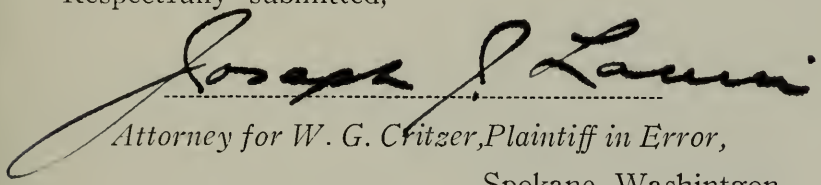
ant Hayden was not guilty, that he did not possess and did not transport the liquor in question, that a verdict finding the defendant Critzer guilty is entirely inconsistent and repugnant to the finding of the defendant Hayden not guilty, for the reason that if the Government alleged and was required to prove a joint venture, manifestly, it would be necessary to convict Hayden, whom the Government contended was the agent of Critzer, before Critzer could be convicted for the acts of his alleged agent, and the jury, having found that the alleged agent was not guilty, then, surely, the claimed principal could not be guilty.

The charge contained in the Information was that of a misdemeanor. It is conceded by the Government (Tr. 27, 28) that at the time of the commission of the offense, Critzer was not in the State of Idaho, nor in the jurisdiction of the within entitled Court, but was in the State of Washington. Critzer, under the charge in this case, could not be guilty of any offence, for the reason that he never was within the jurisdiction of the Court where the action was tried.

All of the questions here presented were properly raised during the trial of the case by Motion of Directed Verdict, by Motion in Arrest of Judgment,

Motion for New Trial, and Judgment of Acquittal, and it is respectfully urged that a consideration of the matters herein presented should result in the reversal of the judgment herein.

Respectfully submitted,



Attorney for W. G. Critzer, Plaintiff in Error,
Spokane, Washintgon.

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No.....

IN THE

United States Circuit Court of Appeals
For the Ninth Circuit

W. G. CRITZER,

Plaintiff in Error

vs.

UNITED STATES OF AMERICA,

Defendant in Error

BRIEF OF DEFENDANT IN ERROR

Upon Writ of Error from the United States District Court for the District of Idaho, Northern Division.

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Attorneys for Plaintiff in Error.

CAPITAL NEWS PUBLISHING CO., BOISE

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For the Ninth Circuit

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Plaintiff in Error

vs.

UNITED STATES OF AMERICA,

Defendant in Error

BRIEF OF DEFENDANT IN ERROR

Upon Writ of Error from the United States District Court for the District of Idaho, Northern Division.

STATEMENT OF THE CASE

An information was filed by the United States Attorney for the District of Idaho, by leave of the court first had and obtained, charging the plaintiff in error W. G. Critzer, together with John Doe Hayden, in three counts, the first count alleging the possession of twenty-three sacks of Canadian bonded liquor in violation of law, the second count with the

transportation of tweny-three sacks of Canadian bonded liquor in violation of law and the third count being a libel against the automobile used in the transportation of the intoxicating liquor referred to in the first and second counts. (Tr. pp. 11, 12, 13, 14 and 15.)

The plaintiff in error was found guilty on all three counts of the information and Joe Doe Hayden was acquitted on all counts. (Tr. p. 16).

The plaintiff in error W. G. Critzer filed a motion in arrest of judgment and, in the alternative, for a new trial (Tr. p. 35), which motion was denied and exception allowed. (Tr. p. 40).

Plaintiff in error was sentenced to pay a fine of Two Hundred and Fifty and no-100 Dollars ($250.00) on the first count and Five Hundred and no-100 Dollars ($500.00) on the second count. (Tr. p. 42).

The case is here on writ of error.

FACTS

The Government relies upon the testimony of Deputy Sheriff C. R. Knight, who resides at Bonners Ferry, Boundary County, Idaho, W. F. Dunning, Sheriff, residing at Bonners Ferry, Boundary County, Idaho, Deputy Sheriff W. C. Welch, who resides at Bonners Ferry, Boundary County, Idaho, John J. Conway, residing at Deep Creek, Idaho,

George R. Hesser, a federal prohibition agent, stationed at Sandpoint, Idaho, Theresa Hatchett, the postmistress at Moravia, Idaho, Emma Simmons, residing at Moravia, Idaho, E. E. Crandall, a special agent of the telephone company, residing at Spokane, Washington, D. E. Dunning, city license inspector and secertary to the Commissioner of Public Safety, at Spokane, Washington, Clarence March, a police officer of Spokane, Washington, and A. C. Henry, prosecuting attorney of Boundary County. The evidence was substantially as follows:

C. R. Knight, deputy sheriff of Boundary County, on the evening of November 7, 1923, in company with Sheriff Dunning, and Deputy Sheriff Welch, received a report that a couple of cars were coming through that night or the morning of the 8th; they drove to a point near Deep Creek and placed some obstacles across the road. About half past four of the morning of the 8th of November, 1923, three cars approached, one jumping the barricade and proceeding westerly. The second car did likewise and that the third car turned easterly; that they took after the one which went easterly, but being unable to locate the car, returned to the point where they had erected the barrier; that at a point about one-half mile west of where the barrier had been erected, they found a Hudson automobile standing in the roadway, stuck in the mud, with twenty-three cases of whiskey piled along the side of the car; that the car was in

the middle of the road in a swampy place and that it would not have been possible for another car to have passed there when the car in question was in the roadway; that the car in question was a Hudson car, 1923, touring; that a driver's license was attached to a little card on the switch with the name of W. G. Critzer upon it; that he saw the second car, the Hudson car referred to, stop in the roadway after going over the barrier and that no other cars had passed that point; that Moravia is about a mile and a quarter by road from this point and is the closest post office. (Tr. pp. 17 and 18).

The witness W. F. Dunning, sheriff, residing at Bonners Ferry, Idaho, testified that on the evening of November 7, 1923, he, in company with the deputies Knight and Welch, went to a point near Deep Creek, his testimony being substantially the same as Knight's in regard to the cars coming and the location of the Hudson car with a plate on the steering wheel having the name of W. G. Critzer on it and also that on account of the position of the car in the swamp no other car could have passed; he testified further that he employed a team to haul the car and whiskey to Bonners Ferry and turned the liquor over to Federal Prohibition Agent Hesser. (Tr. pp. 18 and 19).

The witness W. C. Welch testified that he was a deputy sheriff of Boundary County residing at Bonners Ferry, Idaho, and that he made the trip with Sheriff Dunning and Deputy Sheriff Knight to a

point near Deep Creek. His testimony was substantially the same as the witness Dunning and witness Knight with the exception that he did not testify in regard to the license plate being on the car with the name of W. G. Critzer on it.

The witness John J. Conway testified that he resided near Deep Creek and that on the morning of November 8th Sheriff Dunning came to his place and employed him and his team to assist him in pulling an automobile that was in the roadway. (Tr. p. 20).

The witness George R. Hesser testified that he was a federal prohibition agent stationed at Sandpoint, Idaho; that on November 12, 1923, a Hudson car and intoxicating liquor were turned over to him and by him placed in storage at Coeur d'Alene; that the car bore a Washington license in a leather card case and bore the name of W. G. Critzer; he identified the five sacks of liquor which were received in evidence and without objection and admitted to be intoxicating liquor. The plaintiff in error W. G. Critzer admitted at this time that the car in question belonged to the defendant Critzer and was the car referred to and correctly described in Count Three of the information. (Tr. p. 21).

The witness Theresa Hatchett testified that she was the postmistress at Moravia, Idaho, and that on the morning of November 8, 1923, a gentleman called at her house and asked if he might use the phone; that she could not recognize the man; that the man

wanted to call up Spokane and wanted Main 606; that he tried to get the call through and couldn't and that she called for him and central asked what the name was and he said Hayden; that it was about nine or half past nine in the morning; that the man said he had been wading through the wet grass and that he was cold; that there was no one else present at the time except her mother Emma Simmmons; that she did not hear any part of the conversation between the parties and that she kept no record of the transaction; she testified further that all she did was to put in the telephone call and that she did not hear any conversation. (Tr. pp. 21 and 22).

The witness Emma Simmons testified that she resides at Moravia, Idaho, with her daughter Theresa Hatchett, at the post office and store; that on November 8, 1923, a man called at the post office and store; that she could not recognize any one in the court room as the man who entered the post office and store on the morning of November 8, 1923; that the man wanted to know if he could telephone and that he called Main 606 at Spokane and gave his name as Hayden; that she heard what he had to say over the phone and that he said: "Is this Louie? Tell Joe, I have lost everything—Will be in on 43;" and he further said, "Look out for Grant." His clothes were damp and he spoke about coming through the wet grass and weeds. (Tr. p. 23).

The witness E. E. Crandall testified that he was

employed as a special agent of the telephone company and that he had access to and was in custody of the records of the telephone company; that application for a license for Main 606 at Spokane was made by the Elite Cigar Store, South 7th Stevens Street, Spokane, signed by R. J. Critzer; that on the 7th day of November, 1923, the Elite Cigar Store at South 7th Stevens Street had for its telephone number Main 606. (Tr. pp. 23 and 24).

The witness D. E. Dunning testified that he is city license inspector and secretary to the Commissioner of Public Safety at Spokane; that on April 5, 1923, application for soft drink license for South 7th Stevens Street, Spokane, was made by W. G. Critzer, and that it was signed W. G. Critzer by R. J. Critzer; that a license was therefore issued on May 1, 1923, to W. G. Critzer to conduct a soft drink business at South 7th Stevens Street, Spokane; that he had occasion to visit the place of business prior to and up to November 8, 1923, and that Grant Critzer was in charge; that one of the brothers of W. G. Critzer is named Louie. (Tr. p. 24).

The witness Clarence Marcy testified that he was police officer at Spokane, Washington; that the Elite Cigar store is located at South 7th Stevens Street, Spokane. (Tr. p. 24).

The witness A. C. Henry testified that he was prosecuting attorney of Boundary County and was such on November 8, 1923; that he was acquainted

with a man named Hayden, he did not know his first name; that the Hayden he was acquainted with was the plaintiff in error W. G. Critzer; that he saw the plaintiff in error and the other defendant in the room at the Commercial Hotel in Bonners Ferry some time in November; that a man named Jones took him to the hotel and that Jones said, "This man is in trouble." That he looked over to him and said, "What are you in trouble about?" He said, "I lost my car and I lost my booze down here at Deep Creek." The witness testified that he was not sure that he had ever seen the defendant Hayden before, but that he thought he was the man with Critzer, the plaintiff in error, at the Commercial Hotel, but that he would swear positively as to the plaintiff in error. (Tr. p. 25). That Critzer, the plaintiff in error, was introduced to him as Hayden; that he did not tell him his name was Critzer. (Tr. p. 26.)

The following witnesses were called on behalf of the plaintiff in error W. G. Critzer and the defendant Ray W. Hayden:

The witness Frank Keenan testified that he was a police officer at Spokane, having been such for fourteen years; that he was acquainted with W. G. Critzer, one of the defendants.

It was at this time admitted by the Government that Mr. Critzer was in Spokane on the 8th day of November, 1923, during the early morning and that

it was not the contention of the Government that he was at Bonners Ferry that day.

The defendant Ray J. Hayden testified that he was living at Spokane on November 7, 1923, at the American Hotel, where he had been living from six to nine months prior to that time; that he was acquainted with the plaintiff in error W. G. Critzer, having met him before the trial of this case; that he had never operated the Hudson automobile referred to; that he was not driving said automobile on November 7th or November 8th in the vicnity of Moravia; that he had never ridden or driven it before that time; he testified that he had never been in the town of Bonners Ferry; that he had never seen the witness Henry; that he was never in Bonners Ferry with plaintiff in error Critzer; that he followed the occupation of salesman, selling automobiles and trucks; that he had not sold any automobiles or trucks for eighteen months; that he worked for a time selling tires but had not sold any for about eighteen months; that he worked for a time as a cigar clerk in the Court cigar store; that he was not employed in November, and had not worked since June, 1923; that he was laid off on account of bad health. (Tr. p. 28).

The plaintiff in error W. G. Critzer testified as follows: That he has two brothers named R. J. Critzer and L. E. Critzer; that R. J. Critzer, who made the application for the license for the Elite Cigar Store at Spokane, is a brother of plaintiff in

error; that he operated the Elite Cigar store at Spokane until the first of July, when he went to Californi, coming back on the 18th of August, and that he never operated the cigar store after the first of July; that he is acquainted with his co-defendant, Ray Hayden, and that on November 7th or 8th, he did not lend the car in question to Hayden and did not permit him to drive it and never knew of him having driven the car; that he first learned that the car had been seized about ten o'clock in the morning of November 8th, the information being given to him by Frank Keenan, detective at Spokane; that he was not out of Spokane at any time on the 7th or the morning of the 8th; that he was not driving the automobile in question in the vicinity of Bonners Ferry; that after he had been informed that his car had been seized, he went to the John Doran Company of Spokane, who had a mortgage on the car and that in company with the bookkeeper of that firm he went to Bonners Ferry, Idaho, and talked with Mr. Henry, prosecuting attorney; that Ray Hayden was not with him at that time; that he had not seen Mr. Henry before that time; that he knew Mr. Henry was prosecuting attorney; that he told Mr. Henry the car had been seized and that the John Doran Company had a mortgage on it and that Henry asked him if he had brought the papers with him and that he said he would go back to Spokane and bring them up; that he did not tell Henry that he had lost his car and booze and that he did not know that it was being used for

the transportation of intoxicating liquor at that time. He further testified that a man by the name of Martin B. Ackerman, a man whom he had met in Montana in 1917 when they were working in the woods, was driving the car at the time in question; that he had known Ackerman for some time, but that he had never had any business relations with him; that Ackerman had been in Spokane for about a month and roomed right around the corner from his place, that Ackerman was not doing anything, and that he would see him nearly every night, used to ride home with plaintiff in error nearly every night; that Ackerman told him he was going hunting and that he, Critzer, let him have the car on the morning of the 7th; that he did not know for sure where Ackerman was living but thought he was living at the Montana Hotel or the Empire. (Tr. p. 31). That he never returned after November 7th; that he made inquiries right after this but was unable to find out anything about him; that Ackerman had never communicated with him after the car had been seized. The plaintiff in error Critzer testified that he and his wife had the Big Bend Hotel; that he owned the Elite Cigar Store at Spokane; that he opened up for business in April and left about the middle of June for California; that he came back about August 20th and that he sold his interest; that the telephone number of the store was Main 606; that he was in the taxi business from the spring of 1919 to 1921, but not before or since; that

he sold cars for a year when he had a chance, was not a salesman but worked on a commission. (Tr. p. 32).

The witness Harry Hayden, called on behalf of the defendant, testified that he was a brother of Ray Hayden, one of the defendants; that his brother was living at the American Hotel during the month of November, 1923; that he had been living there for about nine months; that his brother Ray Hayden was around Spokane during the early part of November about the time he was arrested, but that he did not know where he was on November 7th or 8th. (Tr. p. 32).

The plaintiff in error W. G. Critzer was recalled to the stand and testified that a Mr. Bray, bookkeeper for John Doran Company at Spokane, was with him at Bonners Ferry; that he returned to Bonners Ferry, talked with Mr. Henry and showed him papers; that the other man was a Mr. Jones from Sandpoint. (Tr. p. 33.)

After the plaintiff in error W. G. Critzer rested, the witness A. C. Henry was re-called and testified that Critzer never did come to his office, but that a man representing some automobile concern in Spokane came along to his office a few days after the conversation in the hotel with the plaintiff in error Critzer and another man. (Tr. p. 33).

BRIEF OF THE ARGUMENT

1. A motion made for a directed verdict on the

grounds of insufficiency of the evidence made at the close of the Government's case is waived when defendant introduces evidence and fails to re-new the motion at the close of the case.

Prosser v. United States, 265 Fed. 252;

Trelease v. United States, 266 Fed. 886;

Castle v. United States, 233 Fed. 855;

Burton v. United States, 102 Fed. 157.

Simpson v. United States, 184 Fed. 817;

Blackstone v. United States, 261 Fed. 150;

Sanders v. United States, 213 Fed. 573.

2. That the denial by the court of plaintiff in error's motion challenging the sufficiency of the evidence to justify submission of the same to the jury was not an abuse of discretion and is, therefore, not error.

Ketterly v. United States, (9th Circuit) 193 Fed. 561;

Wilberg v. United States, 163 U. S. 632, 41 L. Ed. 289;

Beavers v. United States, 3 Fed. (2nd) 861;

Clark v. United States, 298 Fed. 293;

Remus v. United States, 291 Fed. 513;

Riddle v. United States, 279 Fed. 216;

DeBolt v. United States, 353 Fed. 78.

3. That the verdict of the jury was not inconsistent or repugnant but rather is entirely consistent and it was not error for the court to deny the motion in arrest of judgment and the motion for a new trial.

Andrews v. United States, (9th Circuit), 244 Fed. 418;

Bar v. United States, (9th Circuit), 251 Fed. 339;

Zoline's Federal Criminal Law and Procedure, Vol. 1, page 388;

Holmgren v. United States, 217 U. S. 509, 54 L. Ed. 861;

Zoline's Federal Criminal Law and Procedure, Vol. 1, page 384.

4. That the facts in the Government's case in chief were sufficient to permit the Government to go to the jury.

ARGUMENT

The assignments of error will be taken in their numerical order.

Assignment No. 1 is predicated upon the action of Judge Dietrich in refusing to grant the motion of the plaintiff in error W. G. Critzer made at the conclusion of the Government's case for a directed verdict. After the judge's denial of this motion, evidence was introduced on the part of plaintiff in error and after all the evidence was in, the motion for a directed verdict was not renewed. Under a long line of authorities, it is established that a failure to renew a motion for a directed verdict made at the conclusion of the Government's case, after all the evidence is in, amounts to a waiver of the question of the sufficiency of the evidence.

In the case of Castle v. United States, 233 Fed. 855, (6th Circuit), the court, in discussing the question of failure to renew a motion for directed verdict at the close of the entire case, uses the following language:

> "The assignment concerning denial of motion to direct a verdict is not available to plaintiff in error since the alleged error was waived by the introduction of evidence for the defendants."

Again in Burton v. United States, 142 Fed. 102 Fed. 157, (8th Circuit), the court said:

> "The motion to direct a verdict is waived when the defendant introduces evidence. If the motion is renewed after all the evidence is in, then the court, in passing upon the question, must consider the entire evidence, that of the defendant as well as that of the plaintiff."

Also, in the case of Prosser v. United States, 265 Fed. 252, the precise question here presented was disposed of by the Circuit Court of Appeals, Eighth Circuit, as follows:

> "It is alleged that the court erred in overruling the request of the defendants for an instructed verdict in their favor. This motion was made at the close of the introduction of testimony when all the testimony in chief on the part of the Government was in and was not renewed when all the testimony in the case had been presented. The objection was therefore waived."

We do not feel that it would serve any good purpose

to take up the court's time by quoting further cases on this point. The authorities listed under point 1 of the brief of the argument all sustain the above authorities.

It is the contention of the Government that the evidence introduced in its cases in chief was amply sufficient to warrant the court in denying the motion for a directed verdict and in submitting the case to the jury. Counsel for plaintiff in error strenuously insists that there is nothing in the evidence connecting plaintiff in error with the commission of the crime. His contention in this respect becomes absolutely untenable upon a fair consideration of the evidence.

The evidence shows that the car in which the liquor was found was the admitted property of the defandant W. G. Critzer. It is further shown that on the morning of the night the car was found, a party appeared at Moravia, the nearest post office to the place where the car was found and called up No. Main 606, Spokane, Washington, which was proven to be the phone number of the place of business of plaintiff in error in Spokane. Furthermore, the party who put in the call asked for Louie, who, the evidence shows, was the brother of the plaintiff in error and "stated that he lost everything" and also requested the party with whom the conversation was had to watch out for Grant, which is plaintiff in error's middle name. In addition to this, plaintiff in error appeared in person shortly after the car was found at Bonners Ferry,

Idaho, and there had a conversation with the prosecuting attorney A. C. Henry concerning the car which was in the custody of the officers. He at that time stated:

> "I lost my car and I lost my booze down here at Deep Creek."

Deep Creek being the place near which the Hudson car was found. (Tr. p. 25).

The witness Henry positively identified plaintiff in error as the man with whom he had this conversation. Certainly this evidence was ample to justify the trial court in refusing defendant's motion for a directed verdict and also sufficient to warrant in connecting plaintiff in error with the possession of the liquor found in the car. It is well settled that a motion for a directed verdict should only be granted where, as a matter of law, the court can say there is no evidence to justify the submission of the case to the jury.

In the case of Ketterly v. United States, 193 Fed. 561, this court, having under consideration a motion for a directed verdict, says:

> "A motion for a directed verdict leaves open to the court the question of whether there was any evidence to sustain the verdict, though not to pass upon its weight or sufficiency. * * * * The weight of the evidence and the extent to which it was explained or contradicted were questions exclusively for the jury."

The Supreme Court of the United States, in the case of Wilberg v. United States, 163 U. S. 632, 41 L. Ed., 289, announces practically the same rule as stated by this court in Ketterly v. United States, supra.

In the case of Remus v. United States, 291 Fed. 513, the court held:

> "Motion for a directed verdict necessarily admits for purpose of motion, truth of evidence offered on behalf of the Government."

Again, in case of DeBolt v. United States, 253 Fed. 78, it is held:

> "It is the duty of the court in considering a motion, to take the view of the evidence most favorable to the party against whom it is desired to direct a verdict and from the evidence and inferences reasonably and justifiably drawn therefrom to determine whether or not under the law a verdict should be directed."

Other authorities appearing under point 2 of brief of argument will be found to be similar to the above authorities.

Applying the rules established by the foregoing authorities to the case at bar, it would seem clear that the trial court could do nothing else but deny defendant's motion for a directed verdict.

II.

For the purpose of argument, the Government de-

sires to consider assignments II, III, IV, V and VI together as they resolve on the same questions, namely, the sufficiency of the evidence and the consistency of the verdict of the jury. However, before taking up the consideration of the merits of these assignments, there are certain matters that we would call to the attention of the court in regard to each of the particular assignments.

Assignment III attacks the ruling of the court denying defendant's motion in arrest of judgment. It will be observed on an examination of the showing made in support of the motion in arrest of judgment that the entire matter rested on the question of the sufficiency of the evidence. We think it well established that a judgment in a criminal case can only be arrested for a matter appearing on the face of the record and in this connection the record of the evidence is not considered.

> "The law is well settled that a judgment in a criminal case will, after conviction, be arrested only for a matter appearing of record which would render the judgment erroneous if given; or for a matter which should appear and does not appear on the record; *the evidence being no part of the record* for such purpose."
>
> Zoline's Federal Criminal Law and Procedure, Vol. 1, page 388.

The showing made by plaintiff in error in support of his motion in arrest of judgment goes entirely to the question of evidence and would, therefore, be ab-

solutely insufficient to authorize an arrest of judgment. It is also announced by this court that a denial of a motion in arrest of judgment is not reviewable by writ of error.

> Andrews v. United States (9 Circuit), 224 Fed. 418;
>
> Barr v. United States (9th Circuit), 251 Fed. 339.

Assignments II and IV go to the question of the court's action in overruling defendant's motion for a new trial. The granting or refusal of a new trial is a matter that rests in the sound discretion of the trial court and is not reviewable on a writ of error unless it affirmatively appears from the record that this discretion has been abused .

> "The granting or refusal of a new trial rests in the sound discretion of the trial court and generally is not reviewable on a writ of error."
>
> Zoline's Federal Criminal Law and Procedure, Vol. 1, page 384.
>
> Luderes v. United States, 210 Fed. 419 (9th Circuit).

The above authorities would seem to dispose of assignments II, III, IV, V and VI. However, we will take up the discussion of these assignments on their merits as it is the Government's contention that the evidence of the case was ample to warrant the jury in returning a verdict of guilty against plaintiff in error and that the verdict was entirely consistent and

reasonable. Counsel for plaintiff in error contends that because of the fact that the jury found the defendant Ray W. Hayden not guilty and found the other defendant W. G. Critzer guilty, that the verdict of the jury was inconsistent and should be set aside, counsel's contention in this respect being that it was the Government's contention that the defendant Hayden and Critzer were engaged in a joint enterprise and that Critzer had employed the defendant Hayden to transport the liquor in question and that also under the instructions of the court the jury was required to find that they were engaged in a joint enterprise before they could find the defendant Critzer guilty. These contentions are not correct, it being the theory of the Government that the two defendants were jointly associated in the enterprise but that it was also possible that defendant Critzer was associated with some other person. Furthermore, the court's instructions on this point were quit clear, it being as follows:

> "That the jury must find from the evidence, beyond a reasonable doubt, before they can find the defendant Critzer guilty, that some relationship existed between the defendant Critzer and the defendant Hayden or other driver of the car; that either Hayden or some other driver, was employed by Critzer for or on a contingent basis for transporting said intoxicating liquor, or had joint interest in the transaction, or the defendant Critzer employed him to transport the intoxicating liquor in question, or that Critzer had knowledge that said liquor was to be transported in said car and furnished his car for the unlaw-

> ful enterprise, or that he was aided or assisted by the defendant Hayden, or such other driver, in transporting said intoxicating liquor; and that unless the jury find such facts to exist from the evidence, beyond a reasonable doubt, then they must find the defendant Critzer not guilty."

Under this instruction, it can be seen that the jury might have taken different views of the evidence. They might have decided that the defendant Critzer and Hayden were engaged in a joint enterprise or that the defendant Critzer and some other driver or person were engaged in a joint enterprise. They might have been satisfied, as they undoubtedly were, from the evidence, that plaintiff in error was involved in the crime but that they entertained some doubt as to whether Hayden was the driver of the car. Taking this view of the case it would be entirely reasonable and consistent for the jury to find the defendant Critzer guilty and the defendant Hayden not quilty. Question of the connection of the two defendants with the commission of the crime was manifestly a question for the jury to decide. We know of no authorities and none is cited by counsel for plaintiff in error to the effect that where two defendants are jointly charged with the commission of a crime, and where the jury is satisfied of the connection of one of the defendants with the commission of that crime, that that defendant must be found not guilty should they entertain a reasonable doubt as to the other de-

fendant. This in brief is the position of counsel in his last assignment of error.

In conclusion it is respectfully urged that no error was committed by the trial court in the respect urged by plaintiff in error and that the evidence was sufficient for the case to be given to the jury and sufficient for the jury to base a verdict of guilty as to the plaintiff in error and entirely consistent even though the other defendant was found not guilty. We accordingly pray an affirmance of the judgment.

Respectfully submitted,

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No. 4571

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

J. C. BROOKS and GEORGE WEBB,
Plaintiffs in Error,

vs.

THE UNITED STATES OF AMERICA,
Defendant in Error.

OPENING BRIEF FOR PLAINTIFFS IN ERROR

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IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

J. C. BROOKS and GEORGE WEBB,
Plaintiffs in Error,

vs.

THE UNITED STATES OF AMERICA,
Defendant in Error.

The information in the court below charged Leo E. Larke, J. C. Brooks, George Webb and Fong Hay with violations of the National Prohibition Act in three counts.

The first count alleges that defendants on or about September 24th, 1924, maintained a common nuisance by unlawfully keeping for sale certain intoxicating liquors, described in the information, at 720 K Street, Sacramento, California.

The second count alleges that on the same date defendants unlawfully possessed the same liquors at the same place.

The third count alleges that defendants on the 17th day of September, 1924, sold two drinks of whiskey at the same place.

This information is not made upon the official oath of the United States Attorney or his deputy, but is purported to be based upon and made certain by attached affidavits by reference incorporated therein. And the information is not signed by anybody.

There is no affidavit as to the first and second counts.

An affidavit purports to support the third count, but it alleges a different offense, *i. e.*, maintenance of a

nuisance by sale of two drinks of whiskey. It is made by a person named I. H. Cory who was not present at the time of the alleged sale and had no actual, personal knowledge of the matters alleged.

(Transcript, pp. 2-3-4.)

The Commercial Bar, leased to the defendant, Brooks, occupies part of the first floor of the building at 720 K Street, Sacramento, and extends about thirty feet along the east side of the building. Opposite is the lunch counter or grill, and to the rear is a space used by patrons of the grill for their meals. In connection with the grill is a kitchen at the far end, and a stairway descends from the back door of the kitchen to the alley south of the building. Another stairway descends from the interior of the first floor to the basement. The part of the first floor occupied by the grill and the kitchen is leased to persons not here concerned.

Prohibition Agent Felt, so he testified, purchased two drinks of whiskey from the defendant, Webb, on the 17th of September, 1924, and at the time had some conversation with Webb about the whiskey. The other defendants were not then present, and neither was the affiant, Cory.

(Transcript, p. 29.)

On the 24th of September, 1924, Prohibition Agents Cory, Felt and Camplong raided the place, by virtue, they testified, of a warrant to search the Commercial Bar. They found no liquor about the bar. In the basement Cory encountered a Chinaman, Fong Hay,

who opened a storeroom where were 39 barrels of bottled beer.

(Transcript, p. 32.)

Shortly afterwards Cory and Camplong met Larke in the alley, carrying two suit cases or grips which they demanded that he open. They refused to show him any warrant, arrested him and forcibly seized the grips (Transcript, p. 33) and found therein two bottles of Scotch whiskey, one and one-half pints of jackass brandy, two quarts of the same and five empty bottles. This was all of the liquor described in the information, except the barrels of bottled beer.

At the close of the Government's evidence and at the close of all the evidence motions to instruct the jury to find Brooks not guilty were denied.

Brooks was convicted on all three counts, Larke on the second count, and Webb on the third count.

Motions for new trial and motions for arrest of judgment based upon the defects in the information were denied.

Brooks was sentenced to pay a fine of $1000 and to be imprisoned for one year on the first count, and to be imprisoned for six months on the third count. Webb was sentenced to imprisonment for six months on the third count of the information.

Brooks and Webb, herein called the defendants, bring error.

SPECIFICATIONS OF ERROR.

I.

The information is so defective as to be wholly void.

Consequently the court below never acquired jurisdiction and the motion in arrest of judgment should have been granted.

Webb's Assignments of Error, 1, 2, 3, 4 and 7.
Brooks' Assignments of Error, 1, 2, 3 and 12.

II.

The court erred in denying the motion to suppress evidence concerning liquors obtained by seizure of Larke's grips.

This motion was made before trial on the ground that said property was taken from said Larke without any search warrant and after unlawful search and seizure, and was based upon an affidavit by Larke reciting that at the time while Larke was standing upon a public street, one Camplong took from affiant's possession one suit case containing the five bottles of liquor and another suit case containing five empty bottles. That the suit cases were closed and their contents could not be seen and that they were taken without warrant and without his consent.

In opposition to the motion and affidavit the Government undertook to justify the search and seizure by oral testimony of the agent Camplong.

This evidence is as follows:

The Court. Q. What are the facts?

J. S. Camplong. A. On September 24th, 1924, while raiding the Commercial Bar, located at 720 K Street—we had a search warrant for the place, and just before going into the place and executing that search warrant, we saw a man by the name of Larke who later I knew to be Larke, who

when I first saw him was standing at the front end of the building, and the second time I saw him, while searching the place, he was going from the back end of the same building to a garage on the same lot the building is located on, and for which we had a search warrant. He was carrying a hand bag and went into the garage, and I went to the back end of the garage and looked through a crack in the garage and saw him placing some bottles in the bag. As he came out of the garage door he placed the bags in the car. I stepped up and wanted to know what he had in the bags, and that we had, I said to him we had a search warrant covering all——

The Court. Motion denied.

The only other evidence in the record concerning the search warrant is as follows:

Cory. I had occasion to visit the Commercial Bar and Grill, 720 K Street, on that day. At nine o'clock in the morning I had a search warrant calling for the search of the Commercial Bar on K Street, and I went there with Agents Felt and Camplong and an employee of the District Attorney here. (Transcript, p. 31.)

Camplong. On the morning of September 24th, 1924, at about 9:00 A. M. a search warrant was handed to Mr. Cory and he asked me to accompany him upon a raid. He led us to 720 K Street. (Transcript, p. 40.)

Camplong. Cory demanded the bag and Mr. Larke wanted to know if we had a search warrant for it. Cory told him that would be settled later. (Transcript, p. 42.)

Webb's Assignment of Error No. 5. Transcript, pp. 78-79.

Brooks' Assignment of Error No. 8. Transcript, p. 83.

III.

It was error for the court below to deny motions made during the trial to strike out evidence concerning the liquor obtained by the search and seizure, as shown by the following narrative:

> CORY. At nine o'clock in the morning of September 24th, 1924, I had a search warrant calling for search of the Commercial Bar on K Street and went there with Felt and Camplong and an employee of the District Attorney. I instructed Felt to take care of the bar and that Camplong and myself would search the rest of the premises. I walked down the back stairs to the basement. I found a Chinaman in the basement, and said, "Well, John, where is all the booze in the place?" He said, "Well, there isn't any." *When I searched the Chinaman,* I found nothing on his person. He was standing by a solid partition of rough lumber, with a door and padlock in it. I told him to get me the key and he took the key from a nail around the side and opened the padlock and inside I found 39 barrels such as are used to contain sugar, 27 of the barrels were filled with pint bottles of beer and labelled beer, covered with rice hulls, packed that way and 2 barrels were partially empty, there were about 144 bottles in each barrel. That is one of the bottles taken from the barrels. I took samples from the barrels there and had them submitted to the city chemist to analyze and it was found they contained 3.94% of alcohol.
>
> Mr. JOHNSON. We offer it for identification at this time.
>
> CORY. We made a further search; and Agent Camplong left me and went back into the lot. I think we had only one flashlight with us. I didn't see him for some time and was about to go upstairs when he called to me. He was standing in the alley, by a small garage, a corrugated iron building which would hold just one car, and a car

was out in the street pointing towards Seventh Street. Mr. Larke was standing there and *had a couple of grips in his hands.* Mr. Camplong told me at that time in the presence of Mr. Larke, he said: "I have got the stuff." I says to Larke, "Let me see what you have in those grips?" He said, "Have you got a search warrant?" and with that he pulled back and you could hear the bottles rattle in the grip. I said: *"I put you under arrest right now,* the place is being searched by a warrant which is on the bar in front, the barroom." And I *took the grips away from him* and opened them myself, and in one of the grips we found two quarts of Scotch whisky labelled "Caledonia."

Mr. JOHNSON. With your Honor's permission may I have this marked as Government's Exhibit Two, the grip with this in it?

The COURT. Yes.

Witness CORY (continuing). There were two quarts of Scotch whiskey, Caledonia Scotch, one-half pint bottle of jackass brandy; three quart bottles of either jackass brandy, or rectified, that is, home-made whiskey; it was not distilled, and was not the ordinary type of jackass brandy; and we took Larke into custody and took him upstairs where they already had the Chinaman.

Mr. RUSSELL. We move to strike out the testimony of the witness in regard to the finding of various bottles of liquor in the suitcases, just testified to, on the grounds heretofore urged for the suppression of the evidence.

The COURT. Motion denied. (Transcript, pp. 43-34.)

A. J. AFLECK. I made an analysis of the sample handed me and found it contained 3.94 per cent of alcohol. (Transcript, p. 38.)

HUGO RINGSTTOM. I analyzed this (Exhibit No. 2). It contains distilled spirits commonly known as jackass brandy.

That bottle (Exhibit No. 4) contains imitation whiskey, by imitation whiskey I mean colored alcohol with water in it.

Mr. JOHNSON. May I have the exhibits admitted in evidence, numbered 1 and 2?

Mr. RUSSELL. May it please the Court that will be subject to the objection heretofore urged in reference to Larke, and also the whiskey exhibits which I think are two; and the further objections urged on behalf of defendants, Webb and Brooks, that the same are incompetent, irrelevant, immaterial and not touching on the issues affecting this case as to their guilt or innocence.

The COURT. Objection overruled.

J. S. CAMPLONG. My testimony as to what happened in the basement would be the same as that of the witness Cory. Not finding any liquor other than the beer I extended my search to the back of the premises. As I was going out of the door leading to the basement to the back end of the building I noticed a man whom I had seen as we were entering the place to search it, going from the kitchen. He went around the garage and was out of my sight. I waited a few minutes and proceeded to the garage. First of all as I entered the Commercial Bar to make the raid I saw the man out in front where the bootblack stand it, and when I went in and proceeded with the raid and got to the back of the building several minutes afterwards I again saw the same man. When I first saw him with the hand bag he was coming from the kitchen door going to the garage.

He had one of the grips in his hand; he was only carrying one grip at the time. He went to the garage and was out of my sight then. I waited a few minutes and later I went to the corner of the garage and could hear bottles crackling and hasty movements in there. There was also the buzz of a machine like it was running.

Then I went around to the front of the garage which leads out into the alley, and the machine was standing in front of the garage or rather in the alley facing this street out here, Seventh Street; the motor was running and Mr. Larke came from the corner of the building of the garage and placed this suit case in the back end of the car with another suit case; that is, the hand bag, or rather both hand bags; and as he was in the attempt of locking the door of the garage, I stepped up and began to question him as to what he had in that suitcase, and he gave me the story of being a farmer and going out to his ranch, and I told: "Everybody is temporarily detained here, because this place is being searched, and every bag and everything else is covered by the search warrant on this property—by this search—and I will search everything." And I took up one of the bags out of the car and gave it a shake, and there was a clinking of bottles, and I called Agent Cory to witness what was there. As Mr. Cory came up, I said to Mr. Cory, "We have the liquor here, I believe." And Mr. Cory demanded the hand bag, and Mr. Larke wanted to know if we had a search warrant for it. "That would be settled later," he told him and to go inside. We opened the bag and found liquor in it.

CAMPLONG (upon cross-examination). I assisted in the search of the entire premises and except for the whiskey taken from Mr. Larke I found no liquor except the beer in the basement, nothing but the odor of intoxicating liquor.

Mr. RUSSELL. Incidentally, your Honor, I would ask permission to urge my motion to strike out his testimony on the same grounds as heretofore urged and on the ground that the seizure was illegal.

The COURT. Motion denied.

Webb's Assignment of Error No. 5.

Brooks' Assignments of Error Nos. 17 and 18.

The foregoing are urged by both defendants.

The following specifications are separately urged by Brooks.

IV.

It was error to allow testimony as to a conversation between Webb and Felt concerning whiskey, which conversation took place in Brooks' absence.

> E. G. FELT. I had some conversation with Mr. Webb at the time I purchased the liquor. There was no one present except Mr. Webb and myself and a man unknown to me.
>
> Mr. RUSSELL. I wish to make objection on behalf of Brooks and Larke that it will be hearsay to them.
>
> The COURT. The objection will be overruled.
>
> WITNESS. We were discussing the merits of the whiskey and he said it was Pebble Ford whiskey that he sold me. I asked him if it was hard to get; and he said that they had been fortunate enough to get a few cases. I bought two drinks and paid fifty cents each for them.
>
> Mr. RUSSELL. We urge our original objection and the objection is made as to each defendant separately that it would be hearsay and not binding as to them, that is, the other two defendants.
>
> The COURT. Objection overruled.
>
> Brooks' assignments of error No. 19 and 20.

V.

The Court erred in denying the motions to instruct the jury to find Brooks not guilty, made on the ground of the insufficiency of the evidence.

The whole case shows a most remarkable lack of evidence against Brooks, and we set forth below all

we can glean from the record showing his connection with the matter.

> CORY. We then searched around a little more back of the bar and found the city license, issued by the City of Sacramento to conduct the place in the name of J. C. Brooks. (Tscpt. pp. 34-35.)
>
> LARKE. I leased the place to Mr. Brooks. Mrs. Ida Godwin owns the property at 720 K street. She leases to Matthew J. Rainey and myself. There are different enterprises conducted there. I lease the restaurant to one set of people, and sublet the bootblack stand and have written permission from the landlord to sublet the bar part to Mr. Brooks. On the 24th day of September, 1924, the portion known as the bar was leased to Mr. Brooks. I have no interest in it whatsoever. The license was changed from my name to Brooks on November 15, 1922. That is when he first started paying rent. (Tscpt. p. 61.) Brooks pays $206.00 a month rent. (Tscpt. p. 64).
>
> Brooks' assignment of error No. 9.

VI.

During his argument to the jury the Deputy United States Attorney was guilty of prejudicial misconduct.

> Mr. JOHNSON. Mr. Brooks was not called; but you heard from Mr. Webb here what he had to say.
>
> Mr. RUSSELL. I object to the District Attorney commenting on the fact that the defendant Brooks was not called to the stand in his own behalf, and I assign it as misconduct on the part of the District Attorney.
>
> The COURT. You are within your rights. Gentlemen of the jury, you will hereafter be instructed that the failure of Mr. Brooks to take the stand

is not in any way to be considered against him; that is his privilege.

Brooks' assignment of error No. 23.

ARGUMENT.

First. We contend that the information is fatally defective and conferred no jurisdiction upon the court below.

The general rule may well be that defects in the information should be pointed out by demurrer or motion to dismiss before trial; but we have found no case where this rule has been applied in an instance where the information was not made upon the official oath of the United States Attorney was not signed, and was not supported by affidavit. We take it that the Constitution gives the accused the right to confront his accuser; and it follows that there must be an accuser to be confronted; that there must be some one responsible for the accusation, and against whom redress may be sought.

Informations have been made instruments of oppression. Though allowed in misdemeanor cases, they have been forbidden in felonies; and it has always been held that they must be under sanction, either of the official oath of the United States Attorney or deputy, or by the oath to affidavits made in support of the information by persons having actual and personal knowledge of the facts set forth.

These remarks apply to the first two counts, and in addition we call to the court's attention that the affidavit to the third count is hearsay, being made by Cory, who was not present at the time of the

transactions related in the affidavit. This was not discovered before trial and no motion to quash or to dismiss could have been made on this ground.

The third count is open to the further objection that the affidavit attached thereto and incorporated therein charges a different offense and it well calculated to leave in doubt the particular character of the charge. It has been recently held that such a defect may be raised by motion in arrest of judgment.

U. S. vs. *Craig,* 1 Fed. 2nd 482.

The third count is also bad in that it does not allege to whom the alleged whiskey was sold.

Carpenter vs. *U. S.,* 1 F. (2nd) 314.

There can be no conviction or punishment for a crime without a formal or sufficient accusation. A court can acquire no jurisdiction to try a person for a criminal offense unless he has been charged with the commission of the particular offense and charged in the particular form and mode required by law. (*Weeks* vs. *U. S.,* 216 Fed. 293.)

All arbitrary informations, all informations which spring into existence simply because the king and his attorney elected to present them, indeed all informations except those supported by proof on oath are barred by this constitutional provision (4th amendment) from permissible procedure. (*U. S. vs. Tureaud,* 20 Fed. 621.)

"Probable cause supported by oath or affirmation" means oaths or affidavits of those persons who, of their own knowledge, depose to the facts which constitute the offense. (*U. S. vs. Turead,* 20 Fed. 621.)

While an information filed by the United States Attorney, under the sanction of his official oath, and without verification would be sufficient in certain cases, an information not so filed, but expressly stating on its face that it was made on the oaths of the several parties were attached, is not sufficient, unless the affidavits could be considered as sufficient to support the charge. (*U. S.* vs. *Schallinger Prod.* Co., 230 Fed. 290.

SECOND. The motion to suppress the evidence of intoxicating liquors obtained by the search and seizure of Larke's grips should have been granted.

The evidence given by Camplong on the motion falls short of establishing a legal search. There is nothing there or elsewhere in the record to show that the warrant was ever shown to any of the defendants or that any copy of the warrant was given to any person or left at the place searched, or that any receipt for the property taken was ever given to anybody.

> The Government is required to justify search and seizure.
>
> *U. S.* vs. *Kelliher,* 2 Fed. 2nd 935.
>
> Search warrants and proceedings thereon must be strictly legal.
>
> *Giles* vs. *U. S.,* 284 Fed. 208.
>
> *Entick* vs. *Carrington,* 19 How. St. Tr. 1030.
>
> *Boyd* vs. *U. S.,* 116 U. S. 616, 29 L. Ed. 746.
>
> *Amos* vs. *U. S.,* 65 L. Ed. 654.
>
> When an officer takes property under the warrant he must give a copy of the warrant, together with a receipt for the property taken, specifying

it in detail, to the person from whom it was taken by him, or in whose possession it was found, or, in the absence of any person he must leave it at the place where he found the property.

Section 12, Act June 15, 1917.

A search of a place not described in the warrant is unreasonable.

Peo. vs. *Castree,* 143 N. E. 112.

A copy of the warrant and receipt for property seized must be given.

Giles vs. *U. S. Sup.*

Evidence obtained by unconstitutional use of search warrants is not admissible.

Murby vs *U. S.,* 293 Fed. 849.

Nowhere in the record is anything to indicate compliance with this essential requirement of the statute. The result is that the court erred in admitting evidence of proceedings under the search warrant and concerning liquors and containers seized.

If statute requiring service of copy of search warrant and receipt for articles taken is not complied with the evidence is inadmissible.

Murby vs *U. S. Sup.*

Paine vs *Farr,* 118 Mass. 74.

Kent vs. *Willey,* 11 Gray (Mass.) 368.

Gibson vs. *Holmes,* 78 Vt. 110, 62 At. 11.....

THIRD. The court below should have granted motions to strike out evidence concerning the liquors obtained by illegal search and seizure.

The rule that courts will not stop a trial to inquire whether evidence was lawfully or unlawfully obtained has no application where it is apparent that there has

been an unconstitutional seizure of the property of accused; and the court should exclude such evidence and any testimony relating thereto, on motion of the accused, made after both property and testimony were introduced against him.

Peo. vs. Castree (Ill.), 143 N. E. 117.
Amos vs. U. S., 65 L. Ed. 654. .

Where the facts were not in dispute, but were disclosed by the testimony of the prohibition agent, the objection tendered no collateral issue of fact, and was therefore not too late.

Giles vs. *U. S.*, 284 Fed. 208.

All of the evidence plainly shows that any search warrant the agents may have had covered only the Commercial Bar, and no assumption may be allowed that this warrant authorized search of the basement or the garage or the grips in Larke's hands. .

As is plainly set forth in the cases cited below, the use of search warrants is restricted by the Constitution so as to forbid search by general warrants so called because they authorized search anywhere for any thing.

> A search to be reasonable and therefore lawful must be confined to the place and the seizure to the things particularly described. If it were not the case the effect would be that a search warrant providing for the search of a particular place would become a general warrant when placed in the hands of government officers.
> *U. S.* vs. *Friedberg*, 233 Fed. 313.

> The searches and seizures forbidden by the constitution are unreasonable searches and seizures; and the means of securing this protection was by abolishing searches under warrants which were called general warrants, because they authorized searches in any place for anything.
>
> *Boyd* vs. *U. S.*, 116 U. S. 616, 29 L. Ed. 746.

A very recent case holds as follows:

> Testimony based upon illegal search is inadmissible. Where there was a warrant for search of a grocery store and agents went up a flight of back stairs and found liquor and stills in a room, their testimony on what they found there was inadmissible over objection.
>
> *Giusti vs. U. S.*, 3 Fed. 2nd 703.

It is plain that the search was expressly made to secure evidence, for the agents could have had no prior knowledge of the beer or of the liquor in Larke's grip.

> Search warrants cannot be issued or served merely for the purpose of securing evidence.
>
> *Gouled vs. U. S.*, 235 U. S. 298, 65 L. Ed. 647.
> *Boyd vs. U. S.*, 116 U. S. 616, 29 L. Ed. 746.

It is apparent that at the time Cory knew that he had no right or warrant to detain Larke or to search his grips. On being asked for a warrant, he said: "I put you under arrest right now." Obviously he was trying to effect an illegal search by an illegal arrest. The situation as regards the liquor in Larke's possession is remarkably similar to the conditions in the case of *Snyder* vs. *U. S.* As in the Snyder case, the agents had no knowledge of the liquor,

for all they knew the bottles that Larke had may have all been empty or contained some innoxious fluids. And the case strongly affirms that an officer has no right to stop a citizen on the public street and search his baggage on mere suspicion that he is carrying liquor. The court pertinently observes:

> "If the bottle had been empty or if it had contained any one of a dozen innoxious liquors, the liquors, the act of the officer would admittedly have been an unlawful invasion of the personal liberty of the defendant. The fact that it contained whiskey neither justifies the assault nor condemns the principle which makes such acts unlawful."
>
> *Snyder vs. United States,* 285 Fed. 1.

FOURTH. The testimony of the conversation between Webb and Felt as to whiskey, in Brooks' absence, should not have been allowed. As to Brooks, this evidence was purely hearsay and it was introduced for no other purpose than to show some assumed complicity between Webb and the other defendants in the sale of the whiskey. It was absolutely inconsequential otherwise.

We believe that there is no exception to the rule that testimony as to statements of persons jointly charged in defendant's absence which were not made in furtherance of any common design is hearsay and inadmissable.

The rule is clearly laid down by the Supreme Court of this state in positive and de finite language:

> It was never competent to use as evidence against one on trial the statements of an accomplice, not given as testimony in the case, nor made in the presence of the defendant, nor during the pendency of the criminal enterprice nor in furtherance of its objects. (*People* vs. *Moore,* 45 Cal. 19.) To hold such testimony admissible would be to ignore the rules of evidence.
>
> *Peo.* vs *Oldham,* 111 Cal. 652-653.

The same rule has been repeatedly re-affirmed and is clearly stated in a later decision:

> Nothing is better established than that the statements by an accomplice after the completion of the offense and which are simply narratives of the events concerning the accomplished crime, are not admissible against the defendant on trial, unless made in his presence.
>
> *Peo.* vs. *Dresser,* 17 Cal. Ap. 27.

FIFTH. The court should hav e instructed the jury to find Brooks not guilty.

If we take all of the evidence in the case, and we are considering not only the testimony directly bearing upon him, but all of the other circumstances which indirectly connect him with the matters disclosed upon the trial, there is presented the following conditions:

Larke sublet the Commercial Bar to Brooks for a rental of $206.00 per month. A license to conduct the place stood in his name. In his absence two drinks of whiskey were sold by Webb to a prohibition agent. It appears that Webb also sold beer there. That some of this beer was unlabeled and sold for a higher price than other kinds also dispensed by Webb at the

place. There is sufficient to show that there was a considerable amount of this kind of beer in the basement and that it was brought up by the Chinaman when Webb called for it. There is no proof that Brooks had any connection with the basement. There is no direct evidence as to the relations between Webb and Brooks. There may be an inference that Webb was employed by Brooks, but that is only an assumption. One assumption can not be founded upon another.

And no inference of Brooks' guilt can be allowed merely upon evidence that Webb sold whiskey.

> The law is well settled that the mere sale of intoxicating liquor by an agent is insufficient in itself to warrant a conviction of the principal.
>
> *In re Souza,* 65 Cal. App. 9.

> To render employer responsible for crime of employee he must have directed or incited the violation of the law.
>
> *Fields* vs. *Commonwealth,* 260 SW. 343.
>
> *Grant Bros., Const. Co.* vs. *U. S.,* 232 U. S. 647, 58 L. Ed. 776.

For the same reasons the evidence falls short of establishing that Brooks had possession of any intoxicating liquor.

> The word "possess" means the actual control, care and management, the ownership not being an essential ingredient.
>
> *Blakemore on Prohibition,* Sec. 122, p. 230, citing,

Thomas vs. *State,* 89 Tex. Cr. R. 609, 232 S. W. 826.

Smith vs. *State,* 90 Tex. Cr. R. 273, 234 S. W. 893.

State vs. *Parent* (Wash.), 212 Pac. 1061.

Newton vs. *State* (Tex. Cr. App.), 250 S. W. 1036.

There is no evidence that Brooks had actual care or control or management of any liquor. An inference might be drawn that Webb was employed by Brooks, but that inference alone does not warrant another inference, that unlawful actions by Webb were at Brooks' command or direction. An inference can only be drawn from a fact proven.

And even if it were a proven fact that Webb was Brooks' agent or employee, that, without more, could not make him criminally liable for the unlawful possession or sale of intoxicating liquors.

In re Souza, Sup.

Grant Bros. Const. Co. vs. *United States, Sup.*

All of the circumstances are consistent with Brooks' innocence, and some cases bearing on this point are cited below:

Fact that bottle of whiskey was on the table in the house where defendants lived and that witness took drinks from this bottle is insufficient to show transportation or possession by defendants although the defendants had leased the house.

Huth vs. *U. S.,* 295 Fed. 35.

The presence of liquor outside but near the premises of defendant is insufficient to sustain a conviction.

Troutman vs. *Com.* (Va.), 115 S. E. 693.

There is no evidence worthy of the name that the beer in the basement was of unlawful alcoholic content, although in this respect Cory testified:

> "I took samples from the barrels there and had them submitted to the city chemist to analyze, and it was found that they contained 3.94% alcohol." (Transcript, p. 32.)

While there was no objection that this testimony was hearsay, the positive evidence given by A. J. Afleck, the city chemist, and by the other agent, Felt, show that it is untrue.

Cory also said:

> "That is one of the bottles taken from the barrels." (Transcript, p. 32.)

In regard to this bottle, Afleck testified:

> "I made analysis of the sample of liquor handed me and found it contained 3.94 per cent of alcohol by volume." (Transcript, p. 38.)

In regard to this same bottle, Felt testified:

> "When we made the raid on the Commercial Bar on September 24th I went behind the bar. I found some high proof beer there, that is all the intoxicating liquor I found there. It is the same as is admitted in evidence. That is the bottle there." (Transcript, p. 38.)

These witnesses testified on behalf of the Government and there can be no doubt that the bottle referred to and analyzed by Afleck was the same that was found by Felt back of the bar.

Bearing in mind that the whole case against Brooks rests upon some inference that Webb was his employee and agent and hence Brooks was responsible for his

acts, it is difficult to conceive of any manner in which his convictions for the possession of liquor, as charged in the second count, and for keeping the same liquor for sale, as charged in the first count, can be sustained, for Webb was acquitted on both of those counts.

Peo. vs. *Munroe,* 190 N. Y. 435, 83 N. E. 476.

Sixth. The comment by the United States Attorney on the fact that Brooks had not testified was prejudicial misconduct.

Under the laws of the United States it is provided that a person accused of crime shall, at his own request, but not otherwise, be a competent witness. "And his failure to make such request shall not create any presumption against him."

Act March 16, 1876, c 37 20 St 30.

> Such a statutory provision prohibits any comment by prosecuting attorney on his failure to testify.

Wilson vs. *U. S.,* 149 U. S. 60:

The error of such misconduct can not be cured even where the court checks the prosecuting attorney and instructs the jury to disregard the statement.

> It was error for counsel to comment upon or allude in any way to the fact that defendant had refrained from testifying. Such misconduct should work a reversal even where the court promptly upon objection checks counsel and instructs the jury to disregard the statement, as was done in this case. We are unable to see that the prejudicial impression irresistibly made upon the minds of the jury can be removed by anything the judge may say or do, after the mischief is done.

Peo. vs. *Morris,* 3 Cal. App. 1, per Chipman P. J.

> The theory that a court can remove from the minds of a jury the effect of a statement on the part of the State's attorney referring to the failure of the accused to testify in his own behalf is illusory, and not sustained by common experience. Jurors, however much they are inclined to do so, would find it difficult to efface from their minds the impression made by the remarks of counsel *and reinforced by the instructions of the court again calling to their minds the same fact, though given for the purpose of cautioning them from being influenced by counsel's remarks. The only safe rule, therefore, when counsel for the State has so far overstepped his duties as to call to the attention of the jury the fact that the accused has not taken the stand or offered himself as a witness, is to grant a new trial.*

State vs. *Williams,* 11 So. Dak. 64.

> Where prosecuting attorney referred to fact that accused did not testify, the error was not cured by the court checking attorney and instructing jury to disregard what he had said.

Long vs. *State,* 56 Ind. 182.

We have reverted to the foregoing anticipating that the Government's counsel may attempt to argue that the error was cured by the court's remark: "That the jury would be hereafter instructed that the failure of the defendant, Brooks, to take the stand is not in any way to be considered against him, that is his privilege."

There are cases where it has been held that a reprimand to the prosecuting attorney and a direct,

unqualified admonition to the jury to disregard his statement corrected the error. Such cases are not supported by any clear reasoning such as is set forth in the foregoing excerpts from decisions to the contrary. However, the Government can not derive any comfort here from their authority, for the court did not check, did not reprimand the United States Attorney and did not admonish the jury to disregard his remark. The language of the court on this occasion is as objectionable as in *Wilson* v. *U. S. Sup.*

> Mr. Justice Field. When counsel for defendant called the attention of the court to the language of the district attorney it was not met by any direct prohibition or emphatic condemnation of the court, which only said: "I suppose the counsel should not comment upon the defendant not taking the stand." It should have said that the counsel is forbidden by the statute to make any comment which would create or tend to create a presumption against the defendant from his failure to testify. The refusal of the court to condemn the reference of the district attorney and to prohibit any subsequent reference to the failure of the defendant to appear as a witness tended to prejudice the jury and this effect should be corrected by setting the verdict aside and awarding a new trial.
>
> *Wilson* vs. *U. S. Sup.*

With all due respect to the court below, we think the whole case shows on the part of the court, of the United States Attorney and of the prohibition agents a strong indifference to constitutional rights.

We find an information made by no one and for which no one is responsible; an illegal search and

seizure; refusal by the court to suppress evidence so obtained; refusal by the court to strike out evidence when the unconstitutional nature of the proceedings are demonstrated by the uncontradicted evidence of the agents themselves; misconduct of the United States Attorney unrebuked by the court and without admonition to the jury to disregard it.

And in addition we find a man convicted on three counts and sentenced to heavy fine and long imprisonment where the evidence against him is so slight as to be unworthy to be characterized as vague suspicion.

All of which is respectfully submitted.

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BRIEF FOR DEFENDANT IN ERROR.

STATEMENT.

This is a writ of error sued out by J. C. Brooks and George Webb to the District Court of the Northern District of California.

On December 8, 1924, an information in three counts was filed in the Northern Division of the Northern District of California charging plaintiffs in error, George Webb and J. C. Brooks, and also one Leo E. Larke and one Fong Hay with violations of the National Prohibition Act. The counts were is the usual form, the first charging the maintenance of a nuisance on September 24,

1924, at Commercial Bar and Grill, 720 K Street, Sacramento, in the County of Sacramento, in the said Division, and the liquor referred to was described as 2 quarts scotch whiskey, 1½ pint jackass brandy, 3 quarts jackass brandy, 27 sugar barrels containing pint bottles of home brew beer, 2 sugar barrels full pint bottles home brew beer. The second count charged the unlawful possession of the same liquor at the same time and place. The third count charged the unlawful sale of two drinks of whiskey at the same place on September 17, 1924.

At the trial plaintiff in error Brooks was convicted upon all counts; plaintiff in error Webb convicted on the third count, the sale count, and defendant Larke convicted on the second count, the possession count, and the defendant Hay was dismissed.

The court imposed sentences that defendant Larke pay a fine of $500; that defendant Webb be imprisoned for six months in the County Jail, and that defendant Brooks be fined $1000 and be imprisoned for a period of one year on the first count and be imprisoned for a period of six months on the third count, judgment of imprisonment to run consecutively.

The defendant Larke does not prosecute any proceeding in error.

There is a bill of exceptions in the record which indicates the testimony given on behalf of the

government. It does not contain the charge of the court, nor show that any motion for a directed verdict was made at any time by any defendant.

Witness FELT, a Federal Prohibition Agent, testified that on September 17, 1924, he visited the Commercial Bar and Grill, 720 K Street, Sacramento, and purchased intoxicating liquor from defendant George Webb. Witness had a conversation with Webb and "we were discussing the merits of the whiskey and he said that it was Pebble Ford Whiskey; that he sold me and I asked if it was hard to get and he said they had been fortunate enough to get two cases". Witness bought two drinks and paid 50¢ each for them. Witness saw a Chinaman come from the rear of the building with a bottle containing liquid, and pass it to Webb at the bar; he wiped it off and gave it to a gentleman standing on the other side of the bar who put it in his pocket and walked out. Another gentleman was with witness at the time he bought whiskey, who was unknown to him. Witness met him at the place and he just took witness to the bar and requested Webb for some liquor to put in the coffee. "We put liquor in our coffee and took it back to our table and drank it". The bottle the Chinaman gave Webb contained liquid. Witness didn't know what was in the bottle; it was a pint flask not wrapped (Tr. pp. 29-31).

Witness CORY, a Federal Internal Revenue Agent, on September 24, 1924, visited the Commercial

Bar and Grill, 720 K Street, at 9 o'clock in the morning. Witness had a search warrant calling for the search of the Commercial Bar on K Street and went there with Agents Felt and Camplong and an employee of the District Attorney. Witness entered first, followed by the others, and went directly to the rear. As witness entered he saw Webb standing at the far end of the bar, back of the bar, and he made some motions with his hands under the bar (Tr. p. 31). Witness went directly to the rear, made a search of the kitchen, found nothing, walked down the back stairs to the basement, which opens out into a small driveway, which goes on into the alley between K and L Street. Witness found a Chinaman in the basement, asked where the booze was. The Chinaman replied, "there isn't any." He was standing by a partition, board of rough lumber, with a door and padlock on it. Witness told him to get the key and he took the key from a nail around the side of the partition and opened the padlock. Inside witness found 39 barrels, such as are usually used to contain granulated sugar, 27 of the barrels were filled with pint bottles of beer labeled beer, covered with rice hulls; packed that way and evidently had been shipped in that condition. Two barrels were partially empty. There were about 144 bottles in each barrel. Witness identified one of the bottles. Witness took samples from the barrels, had them submitted to a city chemist to analyze it, and it was

found to contain 3.94 per cent alcohol (Tr. p. 32). The Chinaman was taken up stairs and placed in custody of Agent Felt who had taken Webb into custody. Witness went back to the basement and searched. Directly under the bar was a vat, a big redwood tank containing 800 to 1000 gallons of water. From that vat was a pipe coming down from the drain board of the bar and we could smell liquor around the vat, just the odor on top. Agent Camplong then called witness. Camplong was standing in the alley by a small garage—corrugated iron building—which would hold just one car and a car was out in the street pointing toward Seventh Street; defendant Larke was standing there and had a couple of grips in his hands. Camplong said to witness in the presence of Larke, "I have got the stuff". Witness said to Larke, "let me see what you have in the grips". He said, "Have you got a search warrant" but pulled back and witness could hear the bottles rattle in the grip. Witness said, "I put you under arrest right now, the place is being searched by a warrant which is on the bar in the front". The grips were taken away from Larke and opened by witness. In one was found two quarts of scotch whiskey labeled "Caledonia". There was also found one-half pint bottle of jackass brandy, three quart bottles of either jackass brandy or rectified, that is, home made whiskey. Larke was placed under arrest. Further searching witness found back of the bar a

city license issued by the City of Sacramento to conduct the place in the name of J. C. Brooks. The license was left there (Tr. pp. 33, 34).

The bar was located at 720 K Street, about 18 or 20 feet long. One bartender behind the bar. They had glasses and things behind the bar. As to the connection with the 1000 gallon barrel of water in the basement, in the back of the bar there is a drain board, or what you might call a sink, where the water runs off and in back of the sink there is a pipe, a straight pipe, probably 2 inch, through the floor into the basement, and that was cut off a foot above the level of the tank, and about the level of the tank, did not go into the water (witness illustrates). The tank was about 8 feet high, 6 or 8 feet in diameter. It was filled with water estimated to contain 1000 or 800 gallons. It would come down through the pipe and splash into the water.

There were 39 barrels in the basement; 37 full, 2 partially full. They were packed in there with rice hulls between so that they would not break. I believe they had a paper wrapping, that is a strawboard carton wrapping. Witness saw Webb make some motion behind the bar. Didn't know what he was doing. He leaned down a little. The barrel in the basement was directly underneath the spot where Webb was standing. One of the agents found some home brew beer in the ice box behind the bar (Tr. pp. 31-38).

Witness AFLECK, chemist, made an analysis of the sample of liquor and found it to contain 3.94 per cent alcohol by volume (Tr. p. 38).

Witness RINGSTROM, a chemist, made an analysis of Exhibit 2; said it contained distilled spirits, commonly known as jackass brandy and of Exhibit 4 which contained imitation whiskey, meaning colored alcohol with water in it. The alcoholic content was stated from 44.9 to 44.5 by volume and fit for beverage purposes (Tr. p. 39).

Witness CAMPLONG, a Federal Internal Revenue Agent, on September 24, 1924, at 9 o'clock A. M. accompanied Agent Cory, who had a search warrant, and Agent Felt, on a raid. Went to 720 K Street. Omitting details, witness stated he noticed an odor of liquor in back of the bar and with Cory went to the basement and noticed an odor of liquor in the water of a large vat located under a drain leading to the bar. As witness was going out of the door leading to the basement at the back end of the building, he noticed a man going from the kitchen, carrying a handbag, going into a little garage. Witness had seen the man just before, standing by the bootblack stand in front of the swinging doors outside the bar. Witness thereupon watched the man from the door to see what he was going to do. He went around the garage, out of sight. After a few minutes, witness proceeded to the garage. At the corner of the garage witness could hear bottles crackling and hasty move-

ments, there was also buzz of a machine like it was running. Witness went to the front of the garage. Defendant Larke came from the corner and placed a suit case in the back end of the car with another suit case; as he was locking the door of the garage, witness began to question him as to what he had in the suit case. Larke said he was a farmer going to his ranch. Witness said, "Everybody is being detained here as the place is being searched, and every bag and everything else is covered by the search warrant on the property, and that witness would search everything. Thereupon witness took one of the bags from the car, shook it, there was a clinking of bottles. Witness called Agent Cory. Cory demanded the hand bag. Larke wanted to know if he had a search warrant for it. He opened the bag and found liquor in it.

Witness further said, testifying preliminarily, (Tr. p. 28), that when he went to the garage he looked through a crack and saw Larke placing some bottles in the bag.

Witness further said that he only noticed one sink behind the bar but in the basement there were two drain pipes, one from the front and one in the rear. The tank was under the one in the rear of the bar, toward the alley. That tank was full of water. There was no container under the drain in front. It was dry. Didn't show signs of recent use. Witness smelled liquor on the drain in the rear of the bar.

Witness had previously seen Larke outside of the saloon as witness went in. Larke didn't have the suit case at that time. It was about 15 or 20 minutes after that witness saw him going out of the kitchen with the suit case in hand. He had been talking to two men at the bar.

On cross-examination (Tr. p. 44) witness further said, "as near as I could determine, the barrel was located at the drain furthest from K Street, at the southern end of the bar. I investigated the drain over the barrel to determine that it was the drain from the southern end of the bar. There are two drains, one from the front and the other from the rear. The barrel is not placed so as to catch the dripping from the ice box. The drain it is under leads directly to about where the second drain, or where the southern end of the bar is, and is just about under there, at least it was at that time. I am absolutely sure of that".

Witness Felt further testified (Tr. p. 48) that when the raid was made on the Commercial Bar, September 24, 1924, he went behind the bar, found some highproof beer there, the same as admitted in evidence. Witness could smell liquor behind the bar.

The liquor and suitcase so seized were put in evidence as exhibits.

The defendant Webb testified for the defendants. He denied that he sold two drinks of whiskey to Agent Felt at 720 K Street on the 17th of Sep-

tember; denied the conversation respecting the "Pebble Ford" whiskey. Witness was working at the premises at 720 K Street the day the officers, Camplong, Felt, Cory and Brazer came in. Witness said the barrel in the basement was at the upper end of the bar to catch the drippings from the ice box and ice cream freezer. The drain is a small piece of lead pipe broken off above the barrel catching the flow, that is, catching the drippings from the ice box and ice cream freezer. Witness denied ever being in the basement. Witness was asked if he ever sold beer to anybody. Said bottle beer, semi near beer, the beer in the ice box, the porter brought it and asked if it was real beer, witness said "no, I never tasted it, I never drink anything. 25¢ a drink was charged for it; 25¢ for a bottle of beer" (Tr. pp. 54-55).

Witness was hired by Mr. Brooks. Had been working there two years. When witness wanted beer at the bar he told the porter, the Chinaman, to get it and he got it. Witness further testified:

Witness asked if he knew that they kept beer in the basement answered "they must have, the Chinaman brought it up". When witness wanted a certain kind of beer "the Chinaman attends to all of that". When a customer wants the 25¢ beer witness directs him to bring up a bottle of beer without the label. When a customer was paying 25¢ a bottle and calling for beer without the label, witness imagined he was getting better beer. When

witness wanted beer he just told the porter to go down and get some beer and he got any kind of beer. He had certain shelves there for certain kinds of beer. He kept them full. When we were out he kept them full. The bottle beers we sold were Budweiser, Acme and Tacoma, also beer without the labels (Tr. pp. 58-59).

Defendant LARKE testified; he denied that he was in front of the bar when the officers went in there as testified. He leased the place to Mr. Brooks; a Mrs. Godwin owns the property; the bar part was sublet to Mr. Brooks; the license was changed from the name of witness to Brooks on November 15, 1922, that is, when he first started paying rent. Witness said, referring to the incident of having liquor in the garage, that he had it in his house some time and was taking it to a gun club he belonged to. The jackass brandy was some that a fellow wanted to sell witness but he would not have it, but he had it in his grip. Witness said Brooks paid $206 a month rent.

The specifications of error argued in the printed brief of plaintiffs in error are five in number:

(1) That the information is so defective as to be void;

(2) That the court erred in denying a motion to suppress evidence concerning liquors obtained by seizure from defendant Larke;

(3) That the court erred in denying motions made during the trial to strike out the same evidence;

(4) That the court erred in allowing testimony as to a conversation with one defendant in the absence of the other;

(5) That the court erred in denying motions to instruct the jury to find defendant Brooks not guilty for insufficiency of the evidence;

(6) That the Assistant United States Attorney was guilty of misconduct during argument.

ARGUMENT.

I.

THE INFORMATION FOLLOWS APPROVED FORMS AND IS SUFFICIENT BOTH TO CHARGE CRIMES AND TO GIVE THE COURT JURISDICTION.

The information filed against plaintiffs in error charged in separate counts that they maintained a common nuisance; that they unlawfully possessed intoxicating liquors, and that they unlawfully sold intoxicating liquors. That the averments of the several counts are sufficient to charge the particular crimes is well settled.

Young v. U. S., 272 Fed. 967.

The particular objection of the plaintiffs in error to the information, however, results from the apparent circumstance that a certain portion of the

usual affidavit filed with such informations appears to have been misplaced in the document so that it appears previous to the signature of the United States Attorney. Following the signature there is a portion of the affidavit referring to the third count, which, standing alone, might not be considered complete. It is not clear whether the signature of the United States Attorney instead of being placed at the end of the information proper was inadvertently placed on a portion of the affidavit attached to the information; or, whether after the signing of the information, a portion of the affidavit was inadvertently placed so as to appear in the wrong place.

But there was no motion directed to this alleged defect of the information prior to the trial, or at all. There was no demurrer to the information, nor motion to quash upon any ground. If the matter referred to be a defect, it was wholly one of form and, under the provisions of Section 1025 of the Revised Statutes, cannot be availed of after judgment. While an indictment is ordinarily signed by the United States Attorney, there is no statute or inflexible practice requiring that it should be signed by him.

Miller v. U. S., 300 Fed. 529, 536.

When the information is presented to the court by the United States Attorney and allowed to be filed, and when it recites, as it does here, that it is by the authority of the United States Attorney, it

is submitted that it is sufficient to place a defendant on trial, even if not signed at all. It is customary to endorse on an indictment the words "true bill" and for the endorsement to be signed by the foreman, but it has been held in

Frisbie v. U. S., 157 U. S. 160; 39 L. ed. 657,

that such procedure is not indispensable. It is merely a convenient method of informing the court and placing upon record the action of the Grand Jury. It is held in the same case that such a defect is waived, unless objection is made in the first instance, by a preliminary motion, and that, unless objection is so made, the defect is to be considered merely one as to form and cured by the verdict under Section 1025 of the Revised Statutes.

Referring to the contention of plaintiffs in error that owing to the situation referred to the information cannot be deemed to have been properly verified, we deem it sufficient to say that under the later decisions of this court the information need not be verified at all to constitute it a sufficient pleading to place a defendant on trial.

Miller v. U. S., 6 F. (2d) 120;
Jordan v. U. S., 299 Fed. 298;
Wagner v. U. S., 3 F. (2d) 864.

II.

THERE WAS NO ERROR IN DENYING A MOTION TO SUPPRESS EVIDENCE OF INTOXICATING LIQUORS OBTAINED BY THE SEARCH OF DEFENDANT LARKE; INDEED NO SUCH POINT ARISES IN THE RECORD.

It will be seen that at the time when the Prohibition Agents were searching the premises at the Commercial Bar on K Street, and while engaged in the search, one of them saw Larke going out of the kitchen with a hand bag. The Agent followed him to the garage and, looking through a crack, saw him placing some bottles in the bag (Tr. p. 28). As he came out of the garage door, he placed the bag in the car, whereupon Larke was arrested, the grips taken from him and opened and two quarts of scotch whiskey found with a half pint of jackass brandy, three quart bottles of either brandy or whiskey (Tr. pp. 33-34).

It thus results from the facts that there are several answers to counsel's contention.

(a) There is nothing in the record to show the character of the search warrant under which the agents were operating; there is merely the statement of Agent Camplong (Tr. p. 28) "We had a search warrant for the place". And again, the statement (Tr. p. 33) "The place is being searched by a warrant which is on the bar in front".

The record does not show that any motion to suppress evidence or return liquors or quash the search warrant was made anterior to the calling of

the case for trial, nor does the record show the tenor of the search warrant, anything about the showing made to obtain it, or what sort of return was made. We have merely the statements of the agents referred to which would indicate that they were proceeding under a valid search warrant.

(b) More than that, the agents had the right to accost and arrest Larke for unlawful possession and transportation of intoxicating liquor, the crimes being committed in their presence, as they had ample reason to believe and know from the evidence of their senses.

The decision of the Supreme Court of the United States in the case of

Carroll v. U. S., 267 U. S. 132,

sustaining a search under not dissimilar circumstances would be ample authority for anything the agents did in the instant case, as far as any rights of Larke are concerned.

(c) But there is even the further answer to the contention of plaintiffs in error that Larke, who alone would have the right to complain of any unlawful search of his grips, does not complain, nor does he prosecute error from his conviction for the unlawful possession. The validity of a search of his person or effect cannot be questioned by others.

McDonough v. U. S., 299 Fed. 30;
Heywood v. U. S., 268 Fed. 803;
Remus v. U. S., 291 Fed. 501, 511.

In truth the search of the grips in Larke's hands was entirely proper under the search warrant carried by the officers. For it cannot be disputed that when officers go to a place of business with a search warrant to search the place, and they see a bystander surreptitiously going from the back door with a grip to a neighboring garage or building, and follow and see him endeavoring to conceal the very thing sought to be found, then it is clear that the officers have a right to intercept his actions and seize the articles.

III.

THE COURT DID NOT ERR IN REFUSING TO STRIKE OUT EVIDENCE CONCERNING THE LIQUORS OBTAINED FROM LARKE.

In the third specification argued by plaintiffs in error it is contended that the court erred in not striking out as evidence the liquors so obtained upon the arrest of Larke. It is said that the usual rule that the court will not stop a trial to inquire into the collateral issue has no application. But it clearly has such application. There was no anterior motion to quash the search or suppress the evidence or restore the liquors.

The seizure was made on the 24th of September, 1924. The defendants were informed against on December 8, 1924, and arraigned the same day. The trial was had on February 3, 1925. There was no reason why the motion could not have been made before the trial. Under such circumstances it must

be deemed that a case is presented where the court is not required to turn aside and try the collateral

Souza v. U. S., 5 F. (2d), 9;
McDaniel v. U. S., 294 Fed. 769;
Adams v. New York, 192 U. S. 585; 48 L. ed. 575.

The objection to the evidence at the time of the trial thus came too late. That the liquors seized from Larke's grips were relevant evidence as against him cannot be gainsaid.

In addition to this, under the circumstances it would be an admissible inference for the jury to draw that the liquors attempted to be concealed in the garage had a relation to the Commercial Bar with which the other two defendants were shown to be connected.

But in truth the liquors, being relevant to be received in evidence, were not to be held inadmissible as being taken upon any unlawful search, as we have shown in the preceding section of this brief.

IV.

THE COURT DID NOT ERR IN PERMITTING AGENT FELT TO TESTIFY TO CONVERSATION HAD WITH DEFENDANT WEBB AT THE PLACE IN QUESTION WHEN FELT PURCHASED FROM WEBB CERTAIN WHISKEY.

The witness said, "we were discussing the merits of whiskey and he said it was Pebble Ford Whiskey

that he sold me." I asked him if it was hard to get and he said that they had been fortunate enough to get two cases. Witness bought two drinks and paid 50c each for them. The objection was that on behalf of Brooks and Larke the conversation was hearsay.

But that it is admissible as against Webb cannot be disputed. The testimony was thus properly received.

Pappas v. U. S., 292 Fed. 982;
Itoe v. U. S., 223 Fed. 25, 29.

The defendants Brooks and Larke at best would be entitled to an appropriate instruction limiting the evidence as against them, but this they did not request; or it may be inferred, since the charge is not set forth in the bill of exceptions, that the court did properly charge on the subject.

But in truth the testimony was properly receivable as against Brooks. It was shown that Brooks was the proprietor of the bar; that the license stood in his name; Webb was his employee standing behind the bar selling liquor and at least on this occasion sold contraband liquor. If the parties were both principals in the conduct of the common nuisance, as they undoubted were, the acts or statements of one of them during the continuance of the enterprise in aid of carrying on the business were admissible as against the other. The things said by Webb as to the character and quality of the

liquor he was selling to Felt, at the time he sold it, would be statements made in carrying out the enterprise, and thus admissible as against Brooks.

There is no error in receiving the evidence in the first place, even if inadmissible as against Brooks, and, in the second place, it was properly received as against Brooks.

V.

THE EVIDENCE WAS SUFFICIENT TO JUSTIFY THE VERDICT AS AGAINST DEFENDANT BROOKS ON ALL COUNTS; THERE WAS NO MOTION MADE FOR A DIRECTED VERDICT BY BROOKS.

Preliminarily, the contention of Brooks that the evidence was insufficient to justify the verdict as against him cannot now be availed of since he did not make any motion for a directed verdict either at the close of the government's case (Tr. p. 50), or at the close of all of the evidence (Tr. p. 67). Accordingly, the assignment of error that the court erred in refusing to instruct the jury to render a verdict of not guilty as to Brooks has no basis in the record. Under such circumstances the sufficiency of the evidence will not be reviewed by this court, the question not having been raised in the court below.

Paine v. U. S., No. 4576, 6 F. (2d) .....;
Deupree v. U. S., 2 F. (2d) 44;
Lucis v. U. S., 2 F. (2d) 975;
Bilboa v. U. S., 287 Fed. 185.

Defendants would not have the hardihood to contend that there was any miscarriage of justice in the instant case or that for that reason the court should consider the point although not properly raised.

But if the question of the sufficiency of the evidence as to Brooks did arise on the record, his guilt was abundantly shown by the evidence. Counsel advance the circumstance that Brooks was not present at the time of the sale of the liquor to Agent Felt, nor at the time of the search of the premises under the search warrant. But it was shown by the defendants, themselves, by the testimony of Larke, that the premises in question had been leased by the owner to Rainey and Larke and that these tenants by permission of the landlord, had sublet the bar part on September 24, 1924, to the defendant Brooks, and that the license was changed from the name of Larke to Brooks on November 15, 1924 (Tr. p. 61). At the time of the search the agents found back of the bar a city license issued by the City of Sacramento to defendant Brooks (Tr. p. 34).

Defendant Webb, testifying for defendants, stated that Brooks hired him there (Tr. p. 56). Webb had been found by the agents behind the bar on the two occasions referred to. On one of the occasions Webb had sold the agent intoxicating liquors and the agent had seen him pass a bottle containing liquid to a customer (Tr. p. 31).

In addition to this, the arrangement of the premises was significant. It was found that in the basement, directly under the bar, behind a locked partition and apparently in charge of a Chinese employee, 39 barrels, 27 of which were filled with pint bottles of beer and two partially full; there were about 144 bottles in each barrel. Samples of the liquor were taken and analyzed and proven to contain alcohol to the extent of 3.94 per cent by volume (Tr. pp. 32-38). In addition to this a bottle of high proof beer was found behind the bar, the same as the liquor in evidence, the bottle being produced (Tr. p. 48). There was proven a further unusual feature in the construction and arrangement of the bar. There was the usual sink behind the bar but with a drainpipe leading to a large vat full of water, amounting to 300 or 400 gallons, or, as one witness said, to 1000 gallons. The drain extended to within a foot of the water, and the agents detected the smell of intoxicating liquor all about it. It was evidently intended as the jury could have inferred, as an ingenious device to permit, in case of a sudden raid, the rapid dumping and destruction of such small quantities of contraband intoxicating liquor as the parties may have had behind the bar.

Although the defendants undertook to show that this vat was designed to catch the drippings from an ice cream freezer or ice box, this was denied by the agents and the denial found credence with the

jury so that the denial was an additional badge of guilt. And defendant Webb, testifying for defendants, also stated that when he had a customer calling for 25¢ beer, he would have the Chinaman bring up a bottle of beer without a label and when a customer asked for the 25¢ beer witness imagined he was getting a better beer. Webb also stated that the Chinaman had certain shelves there for certain kinds of beer and kept them full. When witness wanted beer he told the porter to go down and get it. From these statements it is seen that Brooks was the conceded proprietor of the bar; that Webb was the bartender employed by him and was found behind the bar selling whiskey and beer; that when Webb wanted beer he would tell the Chinese employee to bring it from the basement and the character of the stock of beer in the basement was shown to be contraband. More than that, the ingenious construction of the tank with reference to the bar and sink was such as to facilitate the rapid concealment of any small amount of liquor that might be in the bartender's hands in the event of a raid. The arrangement was not newly installed; Brooks, as the jury could well have inferred, could not have been ignorant of these permanent features of the bar,—the devices to facilitate concealment and the large stock of contraband beer in the basement. And he being the proprietor of the bar, he was responsible for the way it was carried on and, accordingly, is clearly shown to have been guilty

of unlawful possession and sale of intoxicating liquor and of maintaining the common nuisance. The evidence was sufficient.

Fassola v. U. S., 285 Fed. 378.

VI.

THERE WAS NO PREJUDICIAL MISCONDUCT ON THE PART OF THE ASSISTANT UNITED STATES ATTORNEY IN HIS ARGUMENT.

The record is meager as to the final assignment of error of the defendants. The full arguments are not preserved. Apparently Mr. Johnson, during his argument for the government, happened to state "Mr. Brooks was not called but you heard from Mr. Webb here what he had to say." It is clear that the incidental reference to Brooks was accidental and not hostile. It does not appear that any argument or inference was sought to be drawn from the circumstance that Brooks did not testify. In any event, when counsel for the defendant called the matter to the court's attention, the court said, "you are within your rights; gentlemen of the jury, you will be hereinafter instructed that the failure of Mr. Brooks to take the stand is not in any way to be considered against him; that is his privilege". Following that, the court instructed the jury in manner, we may infer, to the satisfaction of the defendant since he took no exceptions and has not brought up in the bill of exceptions any portion of the charge.

Thus we have the situation that the reference was accidental and not hostile; that it could not have injured defendant Brooks; and that as soon as the matter was brought to the court's attention it properly instructed the jury on the subject, thus acceding to every request of the defendant in error. If error at all, it could not have been prejudicial.

McDonough v. U. S., 299 Fed. 30, 42.

CONCLUSION.

It is, therefore, respectfully submitted that the defendants were shown by ample evidence to have been engaged in carrying on a bar, having a stock of contraband beer which they were selling and at times they sold whiskey. The court did not err in any of its rulings, either in receipt of testimony or in its charge. The case was fairly tried according to the rules of law, and the judgment should be affirmed.

Respectfully submitted,

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No. 4571

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

J. C. BROOKS and GEORGE WEBB,
Plaintiffs in Error

vs.

THE UNITED STATES OF AMERICA,
Defendant in Error

CLOSING BRIEF FOR PLAINTIFFS IN ERROR

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IN THE

United States Circuit Court of Appeals

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J. C. BROOKS and GEORGE WEBB,
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vs.

THE UNITED STATES OF AMERICA,
Defendant in Error.

THE FACTS

We can not help observing that the United States Attorney in his brief has made several mistakes as to the evidence.

Referring to the witness Cory, on page 4, counsel says:

> "As witness entered he saw Webb standing at the rear of the bar, and he made some motion with his hands."

However, on cross-examination of the witness it was developed that the witness did not see Webb "make some motions with his hands"; that all he saw Webb do was to put his hands beneath the bar. As Webb was the bartender, there was nothing at all suspicious or remarkable about that.

The Government brief then recites that the witness Cory took samples from the barrels which were found in the basement and had them analyzed; and they were found to contain 3.94 per cent of alcohol. (p. 8.) The witness indeed so testified but his statement was

shown to be untrue by other witnesses for the Government.

> CORY: I took samples from the barrels and had them submitted to the city chemist to be analyzed, and it was found that they contained 3.94 per cent of alcohol.
>
> MR. JOHNSON: We offer it for identification at this time. (Trans., p. 32.)
>
> FELT: I went behind the bar. I found some high proof beer there. It is the same that is admitted in evidence. That is the bottle there. (Trans., p. 48.)
>
> AFLECK: I made an analysis of the sample of liquor handed me and found it contained 3.94 per cent of alcohol by volume. (Trans., p. 38.)

There was only one sample of beer admitted in evidence and that was positively identified by Felt as the bottle which he had taken from behind the bar. The same bottle was said by Cory to be one he had taken from the basement.

Another mis-statement of the evidence deserves attention. Referring to Camplong's testimony, counsel says on page 7 of his brief:

> "As witness was going out of the door leading to the basement at the back end of the bar, he noticed a man going out of the kitchen door."

There was no basement at the back end of the bar, except the basement that extended the entire length of the building. The door the witness referred to was at least sixty feet from the bar; and the intervening space and the kitchen was occupied by persons not here concerned.

Camplong on direct examination did say that he saw Larke come out of the kitchen door; but on cross-

examination was compelled to admit that his testimony in this respect was false.

> CAMPLONG: From where I was standing in the basement, it was impossible to see the kitchen door. I assumed he came out of the kitchen door. (Trans., p. 45.)

THE SPECIFICATIONS OF ERROR.

The Government's brief displays the same lack of accuracy in dealing with the specifications of error.

Our first specification is as follows:

> "The information is so defective as to be wholly void. Consequently the court below never acquired jurisdiction, and the motion in arrest of judgment should have been granted."

Speaking of this specification, counsel says:

> "The particular objection of the plaintiffs in error to the information, however, results from the apparent circumstance that a certain portion of the usual affidavit filed with such information appears to have been misplaced in the document so that it appears previous to the signature of the United States Attorney. Following the signature there is a portion of the affidavit referring to the third count, which standing alone, might not be considered complete. It is not clear whether the signature of the United States Attorney instead of being placed at the end of the information proper, was inadvertently placed on a portion of the affidavit attached to the information; or, whether after the signing of the information, a portion of the affidavit was inadvertently placed so as to appear in the wrong place."

I do not think counsel will dispute our statement of the fact that this information and the affidavits are made upon the regular forms used by the United States Attorney in these cases. Consequently it would

have been impossible for a portion of either to have been misplaced, without the use of shears.

The information with the affidavits appears in the transcript on pages one to eight, inclusive. The information ends on page five with the usual language: "Contrary to the form of the statute of the United States of America in such case made and provided." There is no signature at all to this information. Following, there is a garbled form of affidavit made by no one, apparently relating to the first and second counts, and not sworn to before any officer. On this form, the signatures of Sterling Carr and Gerald R. Johnson, appearing in the place for the name of the affiant and the jurat of the officer, having no meaning or relevancy. There follows an affidavit, relating to the third count, sworn to and subscribed by I. H. Cory. This affidavit is complete in itself, and has no bearing on the first or second counts; but in connection with the information and proof has two grave defects. It is purely hearsay, as was demonstrated during the trial, for Cory was not present at the time of the alleged transaction related therein, and had no personal knowledge of the alleged sale of whiskey. Furthermore, it attempts to state an offense, different from that charged in the third count. The third count charges defendants simply with the sale of whiskey; the affidavit relates that they maintained a nuisance:

> "That they did then and there maintain a common nuisance in that said defendants did then and there sell on the premises aforesaid certain intoxicating liquor, to-wit: 2 drinks of whiskey, etc., ..." (Trans., p. 8.)

There is no particular discrepancy in the Govern-

ment's brief as to the form of our second specification of error; but there is a rather astonishing statement in regard to the manner and time of the motion to suppress the evidence. Counsel affects to regard the motion as having been made during the trial. The transcript sufficiently shows that the motion was made before trial and at the earliest time it could have been heard. (Trans., p. 11.)

In regard to our third specification of error counsel again indulges in inaccuracy. He appears to think that the motion referred to in the third specification related only to the liquor found in Larke's grips; but the motion was to strike out all of the evidence concerning liquor obtained by illegal search and seizure, by the search of the bar, the basement and any other part of the building, as well as by the search of Larke's effects.

ARGUMENT.

I.

Our objections to the information are not made on the ground that it is not signed, nor on the ground that it is not verified. The objections are that it is neither signed nor verified; and that while it purports to be based upon and made certain by affidavits, there are no affidavits to the first or to the second counts; and that the affidavit to the third count is hearsay, and therefore not an affidavit at all, and states some offense different from that charged in the third count.

An information may be made upon the official oath of the United States Attorney, without verification, but

if not so made, and expressly purports to be based upon affidavits, it is not sufficient unless the affidavits themselves can be considered sufficient to support the charge.

U. S. vs. *Schallinger Prod. Co.*, 230 Fed. 290.

Where an information is calculated to leave in doubt the mind of a defendant as to the exact nature of the crime attempted to be charged against him, it is defective, and such a defect can be first raised by motion in arrest of judgment.

U. S. vs. *Craig*, 1 Fed. (2nd) 482.

Lately in the District Court at San Francisco, the Hon. John S. Partridge severely condemned a practice similar to the filing of an information based purely on a hearsay affidavit. In the case of *United States* vs. *Antone Brasti*, on a motion for a bill of particulars heard on July 11th, 1925, the learned judge denounced the making of complaints and affidavits by use of fictitious names, in language entirely applicable here, saying: "Every person accused of crime should be faced in court by his accuser." "How can a man make a defense if he is accused by a person giving a fictitious name?"

Similarly, how could these defendants prepare a defense against an accusation by Cory, when the proof would be that the sale was to Felt?

It is idle for the United States Attorney to quote to us Section 1025 of the Revised Statutes, under which he says, defects of form can not be availed of after judgment. Since the objection to the information was

raised by motion in arrest of judgment, his argument does not meet the situation.

U. S. vs. *Craig, supra.*

Ruling on motion in arrest of judgment for defects apparent on face of record may be assigned as error.

Houston vs. *United States*, 2 Fed. (2nd) 497, citing 2 Bishop's New Criminal Procedure, ch. 87.

Blitz vs. *United States*, 153 U. S. 308, 38 L. Ed. 725.

The cases cited by the United States Attorney, *Miller* vs. *U. S.*, 300 Fed. 529, and *Frisbie* vs. *U. S.*, 157 U. S. 160, obviously do not apply here, for on his own statement they relate to indictments, not to informations.

II.

Counsel rather forcibly takes the position in regard to the evidence obtained by the search of Larke's grips that the motion to suppress such evidence could be made only by Larke as he was the only one of the defendants whose personal rights were so infringed. Standing alone that point might be well taken, although his argument is vitiated by the inaccuracy as to the facts displayed throughout his brief. He says: "When officers go to a place of business with a search warrant to search the place and they see a bystander going surreptitiously from the back door with a grip to a neighboring garage or building and follow and see him endeavoring to conceal the very thing sought to be found then it is clear that the offi-

cers have a right to intercept his actions and seize the articles." Now the officers if they had a warrant at all had only a warrant to search the Commercial Bar; the kitchen was not part of the Commercial Bar—it was under the control of persons not here at all interested. The officers did not see Larke come out of the back door, the officers did not see Larke attempting to conceal the very thing sought to be found; all the officers saw Larke do was as related in Camplong's testimony—"He was carrying a handbag and went into the garage and I went out the back end of the garage and heard the clinking of bottles and I looked through a crack in the garage and saw him placing some bottles in the bag." Mr. Cory did not see Larke do anything; he says: "Mr. Larke was standing there and had a couple of grips in his hands. Mr. Camplong told me at that time in the presence of Mr. Larke, 'I have got the stuff.' He said to Larke, 'Let me see what you have in your grips.' Larke said, 'Have you got a search warrant?' "

And it must be remembered that if the agents had any search warrant at all, according to their testimony, that search warrant simply covered the Commercial Bar and when during the course of the trial it was developed that the officers had used unlawful means to affect the search and had proceeded in an unlawful manner, then the motion to suppress the evidence obtained by the unlawful search of Larke's grips was renewed and was joined in by all of the defendants on the ample ground urged in behalf of all of them—that the search and seizure was illegal.

Giles vs. *U. S.*, 284 Fed. 208.

Boyd vs. *U. S.*, 116 U. S. 616.
29 Law Ed. 746.
Amos vs. *U. S.*, 65 Law. Ed. 654.

III.

In regard to the motion to strike out evidence concerning all of the liquors obtained by the illegal search and seizure which is the basis of our third specification of error, we have noted above that counsel for the Government have not set forth accurately the circumstances under which the motion was made. For some reason we are unable to understand counsel's persistence in saying that there was no reason why the motion could not have been made before the trial. Under the authorities to which we refer in our opening brief the motion was made at the proper time, under the proper state of the evidence; there was no dispute as to the manner in which the search was conducted. The evidence given by the agents themselves shows that the search and seizure was illegal and we hope after consideration of those authorities, Government's counsel may be able to understand that there was no collateral issue presented by the motion, consequently the authorities cited by the Government do not apply. In the case of *Souza* vs. *U. S.*, 5 Fed. (2nd) 9, two years had elapsed. The evidence relating to the search and seizure was conflicting. *McDonough* vs. *U. S.*, 294 Fed. 769, is as far as possible from a parallel to the present case. There the motion related to conflicting evidence as to whether or not a sale had been made in a dwelling house, so as to justify search under a warrant. *Adams* vs. *N. Y.*, 192 U. S. 585, 48

Law. Ed. 575, was a case arising under the laws of the State of New York, and the only point remotely in interest was the constitutionality of the New York law and the case could have no bearing here for it is well known that the Courts of the various States do not give the same interpretations to the constitutional measures relating to searches and seizures as do the Courts of the United States. There is no dispute made in the Government's brief as to the existence of the facts disclosed by the evidence and which go to show the illegality of the search and seizure. Counsel does not deny that the Government officers went outside of the place described in the warrant; there was no pretense that the alleged search warrant was ever shown to anybody; there is no pretense that a copy of the alleged search warrant was given to anybody at the place searched or even left there. There was no contention in the Government's brief that a receipt for the articles seized was given to anyone; there was no dispute that the search under the alleged warrant was nothing more than a mere fishing expedition, there being no pretense that the agents knew of the existence that the beer found in the basement, or of the liquors found in Larke's grips. Curiously enough counsel's own language in his brief brings the matter squarely within the rule laid down in *Hagan* vs. *U. S.*, 5 Fed. (2nd) 965. The brief says, page 15: "There is nothing in the record to show the connection of the search warrant under which the agents were operating. There is merely the statement of agent Camplong, Transcript, page 28, 'We had a search warrant for the place.'" Now in the case just cited the

Court said the failure to produce the warrant and vagueness of testimony as to its terms require the assumption that the warrant was insufficient and the seizure illegal.

Hagan vs. *U. S., supra.*
Garske vs. *U. S.*, 1 Fed. (2nd) 620.

We do not believe that counsel can really be satisfied by his argument; at any rate there is no effort on his part to dispute the applicability of the authorities recited in our opening brief.

The Government is required to justify search and seizure.

U. S. vs. *Kelliher*, 2 Fed. (2nd) 935.

Search warrants and places thereon must be strictly legal.

Giles vs. *U. S., supra.*
Boyd vs. *U. S., supra.*
Amos vs. *U. S., supra.*
People vs. *Castree*, 143 N. E. 112.
Murby vs. *U. S.*, 293 Fed. 849.

Carroll vs. *U. S.* does not apply. That is the well known case holding that officers may search automobiles under certain suspicious conditions.

IV.

The fourth specification of error relates to hearsay evidence given in the absence of the defendant, Brooks. We think we have fairly stated the grounds and authoritis sufficient to show that the reception of this evidence over the objections of Brooks were error, and

under the authorities cited we believe that the effect of this testimony could not be curd by only admonition of the court directing the jury not to consider it in relation to the defendant Brooks. If there be a conflict between the rule of the State Court and the rule of the Federal Court, we beg to suggest that the rule of the State Court is the better and more conducive to fairness in the administration of justice.

V.

As to our fifth specification in regard to the motion for a directed verdict, the writer must confess an inexcusable blunder in the preparation of the transcript. Being more familiar with the State practice than with Federal procedure, the writer in preparing the Bill of Exceptions omitted to make the bill show that a motion for a directed verdict was made and exception taken to the ruling of court denying the motion. We believe, however, that in the interest of justice the Court should consider the absolute lack of any real evidence against Brooks and we think that his conviction was indeed a miscarriage of justice. Counsel for the Government by the considerable space which he devotes to discussion of the evidence seems to concede that the circumstances should be considered. There is nothing in the evidence that shows Brooks sold any liquor or had possession of any liquor or maintained the premises as a place for the barter of liquor and keeping the same for sale. There is nothing that counsel says in his brief that adds a single circumstance of any moment to the facts which we discussed in our opening brief, although counsel affects to find

great significance in the arrangement of the premises and particularly dwells upon the presence of a large tank underneath the bar and he says: "It was evidently intended to permit the rapid dumping and destruction of small quantities of contraband intoxicating liquor as the parties may have had behind the bar, although defendants undertook to show that this vat was designed to catch the dripping of an ice cream freezer or ice box, this was denied by the agents and their denial found credence with the jury so that the denial was an additional badge of guilt." We plainly say that we consider all of the testimony in regard to this tank and all of the argument concerning the same as fantastic, for it would have been much simpler for these defendants if they wished to dump intoxicating liquor to allow it to run down an ordinary sink and into an ordinary sewer instead of dumping it into a one thousand gallon tank in such a manner that the odors of intoxicating liquor would be constantly diffused through the atmosphere and attract attention of prohibition agents.

While we are discussing this phase of the case we must ourselves admit a mistake of the fact which we made in our opening brief; there we said that there was no evidence that Webb was employed by Brooks, but we find on re-examination of the transcript, after reading the Government's brief, that Webb himself testified that Brooks was his employer, and since we called attention to so many inaccuracies on the part of the Government's counsel we think it just that we should confess one on our own part.

VI.

Our sixth assignment of error dwells with the conduct of the United States Attorney during the trial. There is no dispute as to the fact that during the course of his argument Mr. Johnson said: "Mr. Brooks was not called, but you heard from Mr. Webb what he had to say." That this was error, all of the authorities agree, although some of the decisions hold that the error may be cured by the immediate reprimand of the offending counsel and by immediate admonition to the jury to disregard entirely such a remark. We believe that we have set forth ample authority to the effect that such an error is incurable, and we are equally certain that if not, under the authorities holding the contrary, no proper action was taken by the court to bring itself within the rules laid down in some Courts that the error can be cured.

We still find after exhaustive search of all the cases that *Wilson* vs. *U. S.*, 149 U. S. 60, is the closest parallel and under the authority of that case the judgment against these defendants must be reversed.

> "The refusal of the court to condemn the reference of the district attorney and to prohibit any subsequent reference to the failure of the defendant to appear as a witness tended to prejudice the jury and this effect should be corrected by setting the verdict aside and awarding a new trial."
>
> *Wilson* vs. *U. S., supra.*

There is no answer for counsel to say that it may be assumed that the court thereafter properly instructed the jury. The error is not curable by an instruction

given hours later or perhaps several days later. It could only be mitigated by the prompt reprimand and the prompt admonition, which some Courts hold may correct the error and save the rights of the defendant.

We again draw attention to the case of *Wilson* vs. *U. S., supra.* That case is exactly similar not only as to the remarks of the court and counsel but to the state of the record. In the Wilson case the record shows that the exception was taken to the remarks of the United States Attorney and the Supreme Court held that the exception was properly taken so as to bring up the record.

We have made a careful examination of the case of *McDonough* vs. *U. S.* relied on here by the Government and find nothing applicable in the McDonough case. Counsel there did not violate the constitution nor the statute which prohibit reference being made to failure of defendant to come forward as a witness. The only remarks made by counsel in the McDonough case to which exception could be taken were somewhat picturesque and rather outside of the evidence. Government's counsel told the jury that it could be anticipated that in the event of McDonough's acquittal some spectacular festivities would be held by the denizens of what he called the tenderloin of San Francisco and that McDonough would be re-crowned king thereof. Although the Court held that this language was improper, it could not be considered a reversible error and this brief statement shows that counsel's reference to the McDonough case went very far afield, and may

be considered as a confession that he can find no authority to support his own contention.

Of course we could prolong this brief interminably by citations from numerous cases and authorities that it is error to comment upon the fact that defendant did not come forward to testify in his own behalf. We assume the rules in relation to this principle of law are well known to this Honorable Court.

In closing we can only say this case is one of extreme importance to the defendants and we are sure the Court will consider every argument we have made and all of the authorities cited.

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No. 4575

United States
Circuit Court of Appeals
For the Ninth Circuit.

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Plaintiffs in Error,

vs.

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Defendant in Error.

Transcript of Record.

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INDEX.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original record are printed literally in italic; and, likewise, cancelled matter appearing in the original record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italics the two words between which the omission seems to occur.]

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For Defendant in Error:

S. W. McNABB, U. S. Attorney; EUGENE T. McGANN, Special Assistant U. S. Attorney, Federal Bldg., Los Angeles, California.

IN THE DISTRICT COURT OF THE UNITED STATES, IN AND FOR THE SOUTHERN DISTRICT OF CALIFORNIA, SOUTHERN DIVISION.

THE UNITED STATES OF AMERICA,	)	No. 6793-B Crim.
-vs- Plaintiff,	)	
	)	CITATION TO WRIT
HERMAN LANDFIELD, J. W. OLIVER and JOHN DOE ELLIS,	)	ERROR.
Defendants.	)	

UNITED STATES OF AMERICA,)
SOUTHERN DISTRICT OF CALIFORNIA : SS
SOUTHERN DIVISION)

TO THE UNITED STATES OF AMERICA, AND TO SAMUEL W. McNABB, UNITED STATES ATTORNEY FOR THE SOUTHERN DISTRICT OF CALIFORNIA, GREETING:

You are hereby cited and admonished to be and appear before the United States Circuit Court of Appeals for the Ninth Circuit, at San Francisco, California, within thirty (30) days from the date hereof, pursuant to the Writ of Error filed in the Clerk's office of the District Court of the United States for the Southern District of California, Southern Division, wherein HERMAN LANDFIELD and J. W. OLIVER are plaintiffs in Error, and you are the Defendant in Error, to show cause, if any there be, why the Judgment in the said Writ of Error mentioned,

should not be corrected and speedy justice should not be done to the parties in that behalf.

GIVEN UNDER MY HAND at Los Angeles, California, in said District, this 7 day of March, 1925.

Bledsoe

Judge of the United States District Court in and for the Southern District of California, Southern Division.

[ENDORSED]: No. 6793-B Crim Dept.——— IN THE DISTRICT COURT OF THE U. S. IN AND FOR THE SOUTHERN DISTRICT OF CALIFORNIA SOUTHERN DIVISION THE U. S. OF AMERICA Plaintiff vs. HERMAN LANDFIELD, et al Defendant CITATION TO WRIT OF ERROR. Received copy of the within citation this 9 day of March 1925 S. W. McNabb U. S. Attorney Eugene T. McGann Attorney for Plaintiff FILED MAR 9 1925 CHAS. N. WILLIAMS, Clerk G. F. Gibson Deputy WARREN L. WILLIAMS SEYMOUR S. SILVERTON 419 FERGUSON BUILDING 307 SO. HILL STREET LOS ANGELES, CAL. BDWY. 7881 Attorneys for Defendants Landfield and Oliver

IN THE DISTRICT COURT OF THE UNITED STATES, IN AND FOR THE SOUTHERN DISTRICT OF CALIFORNIA, SOUTHERN DIVISION.

THE UNITED STATES OF AMERICA, -vs- Plaintiff,	)	No. 6793-B Crim.
HERMAN LANDFIELD, J. W. OLIVER and JOHN DOE ELLIS, Defendants	)	ACCEPTANCE OF SERVICE OF CITATION.

I hereby, this 9th day of March, 1925, accept due personal service of the foregoing citation, on behalf of the United States of America, defendant in error.

Eugene T McGann
Asst Attorney for United States

[ENDORSED]: No. 6793-B Dept. ——— IN THE DISTRICT COURT OF THE U. S. IN AND FOR THE SOUTHERN DISTRICT OF CALIFORNIA SOUTHERN DIVISION The U. S. OF AMERICA Plaintiff vs. HERMAN LANDFIELD, et al Defendant ACCEPTANCE OF SERVICE OF CITATION FILED MAR 9 1925 CHAS. N. WILLIAMS, Clerk G. F. Gibson Deputy WARREN L. WILLIAMS SEYMOUR S. SILVERTON 419 FERGUSON BUILDING 307 SO. HILL STREET LOS ANGELES, CAL. BDWY. 7881 Attorneys for Defendants Landfield and Oliver

IN THE DISTRICT COURT OF THE UNITED STATES, IN AND FOR THE SOUTHERN DISTRICT OF CALIFORNIA, SOUTHERN DIVISION.

--------)	
)	
THE UNITED STATES OF AMERICA,)	No. 6793-B Criminal
-vs- Plaintiff,)	
)	
HERMAN LANDFIELD, J. W. OLIVER, and JOHN DOE ELLIS,)	WRIT OF ERROR.
Defendants.)	

UNITED STATES OF AMERICA: SS

THE PRESIDENT OF THE UNITED STATES OF AMERICA, TO THE HONORABLE JUDGE OF THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF CALIFORNIA, SOUTHERN DIVISION, GREETING:

Because in the record and proceedings, and also in the rendition of the Judgment of a cause which is in said District Court before you, between HERMAN LANDFIELD and J. W. OLIVER, Plaintiffs in Error, and the United States of America, Defendant in Error, a manifest error has happened, to the great damage of said Herman Landfield and J. W. Oliver, Plaintiffs in Error, as by their Complaint appears: We being willing that error, if any hath happened,

should be duly corrected and full and speedy justice done to the parties aforesaid, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the records and proceedings aforesaid, and all things concerning the same, to the United States Circuit Court of Appeals, for the Ninth Circuit, together with this Writ, so that you have the same at the City of San-Francisco, in the State of California, within thirty (30) days from the date hereof, in the said United States Circuit Court of Appeals, to be then and there held, that the record and proceedings aforesaid, being inspected, the said Circuit Court of Appeals, may cause further to be done therein, to correct the errors, what of right and according to the laws and customs of the United States should be done.

WITNESS, the Honorable WILLIAM HOWARD TAFT, Chief Justice of the United States, this 5th day of March, 1925.

(Seal) CHAS. N. WILLIAMS
Clerk of the United States District Court, Southern District of California, Southern Division.

R S Zimmerman
Deputy

Allowed by: Bledsoe
Judge

I hereby certify that a copy of the within Writ of Error was on the 6th day of March, 1925 lodged in

the office of the clerk of the said United States District Court, for the Southern District of California, Southern Division, for said defendants in error.

CHAS. N. WILLIAMS

(Seal) Clerk of the District Court of the United State for the Southern District of California

BY: G. F. Gibson

Deputy clerk.

[ENDORSED]: NO. 6793-B Crim. IN THE DISTRICT COURT OF THE UNITED STATES, IN AND FOR THE SOUTHERN DISTRICT OF CALIFORNIA SOUTHERN DIVISION. THE UNITED STATES OF AMERICA, Plaintiff, -vs- HERMAN LANDFIELD, J. W. OLIVER and JOHN DOE ELLIS, Defendants. WRIT OF ERROR FILED MAR 6 1925 CHAS. N. WILLIAMS, Clerk G. F. Gibson Deputy WARREN L. WILLIAMS S. S. SILVERTON 419 Ferguson Bldg. 307 So. Hill Street LOS ANGELES, CAL. Bdwy. 7881 Bdwy. 7880 Attorneys for Defendants, Landfield & Oliver

N B/W $2000 S

IN THE DISTRICT COURT OF THE UNITED STATES IN AND FOR THE SOUTHERN DISTRICT OF CALIFORNIA SOUTHERN DIVISION

THE UNITED STATES OF AMERICA, Plaintiff,	)	
vs.	)	INFORMATION
HERMAN LANDFEILD, J. W. OLIVER and JOHN DOE ELLIS Defendant.	)	National Prohibition Act

BE IT REMEMBERED, that Joseph C. Burke, United States Attorney for the Southern District of California, who prosecutes in behalf and with the authority of the United States, makes known to, and informs, the Court that heretofore, to-wit: on or about the 28th day of July, A. D. 1924, one HERMAN LANDFEILD, J. W. OLIVER and JOHN DOE ELLIS at Los Angeles, Los Angeles County, California, in the division and district aforesaid, and within the jurisdiction of this court, did knowingly, willfully and unlawfully sell for beverage purposes to one I. W. Cory about one (1) bottle of intoxicating liquor then and there containing alcohol in excess of one-half of one per cent by volume, at and for the agreed price of Five ($5.00) Dollars lawful money of the United States; in violation of Section 3, Title

II, of the National Prohibition Act of October 28, 1919;

Contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America.

SECOND COUNT

And now comes Joseph C. Burke, United States Attorney for the Southern District of California, who prosecutes in behalf and with the authority of the United States, and makes known to, and informs, the Court that heretofore, to-wit: on or about the 30th day of July, 1924, HERMAN LANDFIELD, J. W. OLIVER and JOHN DOE ELLIS, at Los Angeles, Los Angeles County, California, in the division and district aforesaid, and within the jurisdiction of this court, did knowingly, willfully and unlawfully sell for beverage purposes to one C. W. Ahlin, about one (1) bottle of intoxicating liquor then and there containing alcohol in excess of one-half of one per cent by volume, at and for the agreed price of Seven ($7.00) Dollars, lawful money of the United States; in violation of Section 3, Title II, of the National Prohibition Act of October 28, 1919.

Contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America.

THIRD COUNT.

And now comes Joseph C. Burke, United States Attorney for the Southern District of California, who prosecutes in behalf and with the authority of the

United States, and makes known to, and informs the Court that heretofore, to-wit: on or about the 7th day of August, 1924, HERMAN LANDFEILD, J. W. OLIVER and JOHN DOE ELLIS, at Los Angeles, Los Angeles County, California, in the division and district aforesaid, and within the jurisdiction of this court, did knowingly, willfully and unlawfully sell for beverage purposes to one Paul Hooke about one (1) pint of intoxicating liquor then and there containing alcohol in excess of one-half of one per cent by volume, at and for the agreed price of Seven ($7.00) Dollars, lawful money of the United States; in violation of Section 3, Title II, of the National Prohibition Act of October 28, 1919;

Contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America.

FOURTH COUNT.

And now comes Joseph C. Burke, United States Attorney for the Southern District of California, who prosecutes in behalf and with the authority of the United States, and makes known to, and informs, the Court, that heretofore, to-wit: on or about the 29th day of August, A. D. 19—, one HERMAN LANDFEILD, J. W. OLIVER and JOHN DOE ELLIS at Los Angeles, Los Angeles County, California, in the division and district aforesaid, and within the jurisdiction of this court, did knowingly, willfully and unlawfully have in their possession about Three (3) quarts and one (1) pint of intoxicating liquor, then

and there containing alcohol in excess of one-half of one per cent by volume, for beverage purposes; in violation of Section 3, Title II, of the National Prohibition Act of October 28, 1919;

Contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America.

FIFTH COUNT.

And now comes Joseph C. Burke, United States Attorney for the Southern District of California, who prosecutes in behalf and with the authority of the United States, and makes known to, and informs, the Court that heretofore, to-wit: on or about the 29th day of August, A. D. 1924, one HERMAN :*AMDFEO:D*, J. W. OLIVER and JOHN DOE ELLIS at Los Angeles, Los Angeles County, California, in the division and district aforesaid, and within the jurisdiction of this Court, did knowingly, willfully, and unlawfully maintain a common nuisance, to-wit: a room, building and place at Glendale Tavern, 1120 S. San Fernando Boulevard, Los Angeles, County of Los Angeles where intoxicating liquor then and there containing alcohol inexcess of one-half of one per cent by volume was manufactured, kept, sold and bartered for beverage purposes; in violation of Section 21, Title II, of the National Prohibition Act of October 28, 1919;

Contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America.

WHEREUPON, the said Attorney for the United States prays that due process of law may be awarded against the said defendant to make them answer the premises aforesaid.

JOSEPH C. BURKE,
United States Attorney.
Russell Graham
Assistant United States Attorney.

UNITED STATES OF AMERICA,)
) SS.
Northern District of California.)

I, I. W. Cory, Federal Prohibition Agent, being first duly sworn on oath, says: that he has read the foregoing information and that the matters contained therein are true in substance and in fact.

I. W. Cory

SUBSCRIBED AND SWORN to before me this 30th day of Sept. 1924.

Walter B. Maling, Clerk U. S. District Court,
(SEAL) Northern District of California.
By F. M. Lampert Deputy

[ENDORSED]: No. 6793 B Crim. In the DISTRICT COURT of the United States For the Southern District of California, Southern Division UNITED STATES OF AMERICA, Plaintiff, vs. HERMAN LANDF*EI*LD, J. W. OLIVER JOHN DOE ELLIS Defendant INFORMATION Viol: Sec. 3, Title II, N. P. A. 11/17/24 Defendants Herman Landf*ei*ld and J. W. Oliver arraigned and enter separate pleas

of not guilty. Chas. N. Williams, Clerk U. S. District Court, Southern District of California By B. B. Hansen Deputy FILED OCT 17 1924 CHAS. N. WILLIAMS, Clerk By Louis J. Somers Deputy Clerk

At a stated term, to wit: The July Term, A. D. 1924 of the District Court of the United States of America, within and for the Southern Division of the Southern District of California, held at the Court Room thereof, in the City of Los Angeles, on Monday the 17th day of November, in the year of Our Lord one thousand nine hundred and twenty-four.

Present:

The Honorable BENJAMIN F. BLEDSOE, District Judge.

UNITED STATES OF AMERICA, Plaintiff, vs. Herman Landfeild, J. W. Oliver and John Doe Ellis, Defendants.	No. 6793-B. Crim.....

This cause coming before the court for arraignment and plea of defendants herein; Eugene T. McGann, Esq., Assistant United States Attorney, appearing as counsel for the Government; defendants Herman Landfeild and J. W. Oliver being present in court with their attorney S. S. Silverton, Esq., the Information is read in open court, and said defendants having stated their names to be as given therein, are required to enter their pleas and defendants Herman Landfeild and J. W. Oliver having thereupon entered their sep-

arate pleas of not guilty to each of the five counts of the Information, it is by the court ordered that this cause be continued to the December calendar for setting for trial of said two defendants.

At a stated term, to wit: The January Term, A. D. 1925 of the District Court of the United States of America, within and for the Southern Division of the Southern District of California, held at the Court Room thereof, in the City of Los Angeles, on Tuesday the 24th day of February, in the year of Our Lord one thousand nine hundred and twenty-five.

Present:

The Honorable BENJAMIN F. BLEDSOE, District Judge.

UNITED STATES OF AMERICA, Plaintiff,	
vs.	
	No. 6793-B.
Herman Landfeild; J. W. Oliver and John Doe Ellis, Defendants.	Crim.....

This cause coming on at the hour of ten o'clock A. M. for trial of defendants Herman Landfeild and J. W. Oliver before this court and a jury to be impanelled; Eugene T. McGann, Esq., Assistant United States Attorney, appearing as counsel for the Government; defendants Herman Landfeild and J. W. Oliver being present in court with their attorney Warren L. Williams, Esq., it is by the court ordered that a jury be impanelled herein, and thereupon the following twelve names are drawn from the jury box:

Dade D. Sayer; John E. Barber; Louis J. Harris; Chas. S. Gilbert; C. B. Blain; Geo. Guppy; Bernard Newman; Chas. W. Bell; James A. Bothwell; Geo. L. Proctor; Edward I. Moore and Chas. A. Henderson, and said petit jurors having been examined for cause by the court and by Warren L. Williams, Esq., counsel for the defendants, and passed for cause,

Said petit jurors Chas. W. Bell and Bernard Newman are peremptorily challenged by counsel for the defendants, and said petit jurors having been excused by the court,

It is by the court ordered that two more names be drawn from the jury box, and the names of Spencer L. Toll and Kenneth E. Preuss having been drawn, said petit jurors are examined by the court and by Warren L. Williams, Esq., for cause, and said petit jurors having been passed for cause,

Said Spencer L. Toll is peremptorily challenged by counsel for the defendants, and said Spencer L. Toll having been excused by the court,

It is by the court ordered that one more name be drawn, and the name of Franklin Otis Booth having been drawn, said Franklin Otis Booth is examined by the court for cause and said petit juror having been passed for cause, and counsel for the respective parties not having desired to peremptorily challenge the petit jurors now in the box, it is by the court ordered that said petit jurors be sworn in a body as the jury to try this cause, said petit jury, as sworn at the hour of 10:35 o'clock A. M. consisting of the following named persons, to wit:

THE JURY:

Dade D. Sayer,	James A. Bothwell,
John E. Barber,	Geo. L. Proctor,
Louis J. Harris,	Edward I. Moore,
Chas. S. Gilbert,	Chas. A. Henderson,
C. B. Blain,	Kenneth E. Preuss,
Geo. Guppy,	Franklin Otis Booth,

I. H. Cory is called and sworn and testifies in behalf of the Government, and in connection with his testimony there are offered and admitted in evidence in behalf of the Government the following exhibits, to wit:

Plaintiff's Ex. No. 1: White Rock bottle containing about one-third full of liquor (Gin)

" " " 2: Pint bottle partly full of liquor (whiskey)

" " " 3: Two bottles containing gin—one bottle containing a small amount of Scotch whiskey

and

Said witness I. H. Cory having been cross examined by Warren L. Williams, Esq., counsel for defendant Herman Landfeild and J. W. Oliver,

At the hour of 11:15 o'clock A. M. the court admonishes the jury that during the progress of this trial they are not to speak to anyone about this cause or any matter or thing therewith connected; that until said cause is finally submitted to them for their deliberation under the instruction of the court they are not to speak to each other about this cause or any

matter or thing therewith connected, or form or express any opinion concerning the merits of the trial until it is finally submitted to them and declares a recess for five minutes, and at the expiration of said five minutes the court having reconvened and all being present as before, and at the hour of 11:20 o'clock A. M. the court having ordered that the trial be proceeded with,

Minnie E. Cory is called and sworn and testifies in behalf of the Government, and said witness having been cross examined by Warren L. Williams, Esq.,

C. W. Ahlin is called and sworn and testifies in behalf of the Government, and said witness having been cross examined by Warren L. Williams, Esq.,

At the hour of twelve o'clock noon the court gives to the jury herein the aforementioned admonition, and declares a recess to the hour of two o'clock P. M. and at the hour of two o'clock P. M. the court having reconvened and all being present as before,

And at the hour of 2:15 o'clock P. M. the Government having rested,

Warren L. Williams, Esq., moves for an instructed verdict, and said motion having been denied by the court,

Herman Ellis Landfeild is called and sworn and testifies in his own behalf and is cross examined by Eugene T. McGann, Esq., and said witness having been examined by the court,

Attorney Warren L. Williams, Esq., moves to dismiss, and said motion having been denied,

At the hour of 2:35 o'clock P. M. the defendants rest; and

There having been no rebuttal for the Government,

Attorney Warren L. Williams, Esq., asks for thirty minutes to argue for defendants, and said request having been denied, and the court having granted Attorney Warren L. Wiliams, Esq., fifteen minutes for argument,

Eugene T. McGann, Esq. argues to the jury in behalf of the plaintiff, and at the hour of 2:42 o'clock P. M. Warren Williams, Esq., having argued for the defendants, at the hour of 3:12 o'clock P. M. Eugene T. McGann, Esq., argues in reply, and the court having instructed the jury with respect to the law involved in this cause, and at the hour of 3:42 o'clock P. M. Warren L. Williams, Esq., having excepted to the instructions of the court to the jury, at the hour of 3:45 o'clock P. M. the jury retire in custody of Bailiff Felix Clavere to deliberate upon their verdict, and thereupon at the hour of 5:10 o'clock P. M. the jury return into court and are asked through their foreman if they have agreed upon a verdict, and the jury having replied that they have so agreed, it is by the court ordered that said verdict be presented and read by the clerk of the court, said verdict as presented and read by the clerk of the court being as follows, to wit:

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF CALIFORNIA, SOUTHERN DIVISION. United States of America, Plaintiff vs. Herman Landfeild, J. W. Oliver and John Doe Ellis, Defendants. Ver-

dict No. 6793 B. Crim. We, the jury in the above entitled case, find the defendant, Herman Landfeild, guilty as charged in the 1st count of the Information, and guilty as charged in the 2nd count of the Information, and not guilty as charged in the 3rd count of the Information, and guilty as charged in the 4th count of the Information, and guilty as charged in the 5th count of the Information; and the defendant J. W. Oliver, not guilty as charged in the 1st count of the Information, and not guilty as charged in the 2nd count of the Information, and not guilty as charged in the 3rd count of the Information, and guilty as charged in the 4th count of the Information, and guilty as charged in the 5th count of the Information. Los Angeles, California, February 24, 1925. James A. Bothwell, Foreman

and

The verdict having been presented and read by the clerk of the court as aforesaid as to said defendants Herman Landfeild and J. W. Oliver, and filed herein, it is by the court ordered that defendants be remanded into the custody of the United States Marshal and that this cause be continued to the hour of ten o'clock A. M. February 25th, 1925, for sentence of said defendants.

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF CALIFORNIA SOUTHERN DIVISION.

United States of America, Plaintiff,	)	VERDICT.
Vs.	)	
	)	No. 6793-B-Crim.
Herman Landfeild, J. W. Oliver and John Doe Ellis, Defendants.	)	

We, the Jury in the above entitled case, find the defendant, Herman Landfeild,

Guilty as charged in the 1st count of the Information, and

Guilty as charged in the 2nd count of the Information, and

Not Guilty as charged in the 3rd count of the Information, and

Guilty as charged in the 4th count of the Information, and

Guilty as charged in the 5th count of the Information; and the defendant, J. W. Oliver,

Not Guilty as charged in the 1st count of the Information, and

Not Guilty as charged in the 2nd count of the Information, and

Not Guilty as charged in the 3rd count of the Information, and

Guilty as charged in the 4th count of the Information, and

Guilty as charged in the 5th count of the Information.

Los Angeles, California, February 24, 1925.

James A. Bothwell,
FOREMAN.

[ENDORSED]: FILED FEB 23 1925 Chas. N. Williams, Clerk Edmund L. Smith Deputy

At a stated term, to wit: The January Term, A. D. 1925 of the District Court of the United States of America, within and for the Southern Division of the Southern District of California, held at the Court Room thereof, in the City of Los Angeles, on Wednesday the 25th day of February, in the year of Our Lord one thousand nine hundred and twenty-five.

Present:

The Honorable BENJAMIN F. BLEDSOE, District Judge.

UNITED STATES OF AMERICA, Plaintiff, vs. Herman Landfeild; J. W. Oliver and John Doe Ellis, Defendants.	No. 6793-B. Crim.....

This cause coming before the court for sentence of defendant Herman Landfeild and J. W. Oliver, at the hour of 10:25 o'clock A. M.; Eugene T. McGann, Esq., Assistant United States Attorney, appearing as counsel for the Government; defendants Herman Landfeild and J. W. Oliver being present in court in the

custody of the United States Marshal with their attorney Warren L. Williams, Esq.,

Warren L. Williams, Esq., argues and presents a motion for new trial, and said motion for a new trial having been denied, and an exception having been noted for the defendants,

The court pronounces sentence upon defendants for the offence of which they stand convicted, namely, violation of the National Prohibition Act of October 28th, 1919, and it is the judgment of the court that defendant Herman Landfeild be imprisoned in the Orange County Jail, County of Orange, California, for the term and period of six months upon each of the first and second counts, said terms of imprisonment to begin and run concurrently, and that he be imprisoned in the said Orange County Jail for the term and period of one year upon the fifth count of the Information, to begin and run concurrently with the terms of imprisonment imposed on the first and second counts, and to pay unto the United States of America a fine in the sum of $1000.00 and stand committed to the said Orange County Jail until said fine shall have been paid, and to pay a fine of one dollar on the fourth count; and it is the judgment of the court that defendant J. W. Oliver pay unto the United States of America a fine of one dollar on the fourth count of the Information and stand committed to the Orange County Jail, County of Orange, California, for the term and period of six months on the fifth count, and

Both defendants having been remanded into the custody of the United States Marshal and having been granted ten days' stay of execution of sentence,

It is ordered by the court that said defendants be allowed an additional ten days in addition to the time allowed by law to file bill of exceptions, and that the United States Marshal be authorized to take defendants, in custody, to attend to certain of their business matters, at the Marshal's convenience, and in his discretion.

IN THE DISTRICT COURT OF THE UNITED STATES, IN AND FOR THE SOUTHERN DISTRICT OF CALIFORNIA, SOUTHERN DIVISION.

THE UNITED STATES OF AMERICA, Plaintiff, -vs- HERMAN LANDFIELD, J. W. OLIVER and JOHN DOE ELLIS, Defendants.	No. 6793-B Criminal REQUEST FOR INSTRUCTIONS UPON BEHALF OF DEFENDANTS, LANDFIELD AND OLIVER.

The defendants, HERMAN LANDFIELD and J. W. OLIVER, in the above entitled matter hereby requests the Court to instruct the Jury by giving to the Jury each and every one of the instructions attached hereto and marked Numbers 1 to ————, inclusive.

DATED: ——————————, 1925.

Attorney for Defendants, Landfield and Oliver.

Refused

Bledsoe

J

You are instructed that the terms "defendant" and "defendants" are used interchangeably in these instructions, and that unless one defendant is specifically referred to by name or description herein, when the term 'defendant' is used in these instructions, the defendants who appear here are *refered* to.

DEFENDANTS' INSTRUCTION #1
GIVEN:

The law presumes each defendants to be of good character, and it is your duty to do likewise, and you must not draw any presumption against these defendants that you would not against any other persons of good character charged with a like offense.

DEFENDANTS' INSTRUCTION NO. 2
GIVEN:

Judge.

The fact that the defendants, Landfield or Oliver, were friendly, or even intimately friendly with the defendant, Ellis, is not a circumstance in itself to be considered against them, neither is it sufficient to

show that these defendants were involved with the said Ellis in the commission of said offense, if any was committed, but the prosecution must connect the defendants, Landfield and Oliver in some way with the commission of the alleged offense and no presumption is to be indulged in against them because the evidence may point to the guilt of the co-defendant, Ellis.

DEFENDANTS' INSTRUCTION NO. 3 GIVEN:

Judge.

The defendant in this case is presumed by law to be innocent of any crime until guilt of such crime and every essential element thereof is established beyond a reasonable doubt.

It is incumbent upon the prosecution to prove every material element of the offense charged beyond a reasonable doubt, and if you have such reasonable doubt as to whether they have proved or have failed to prove any one essential and material fact going to make up guilt, it is your sworn duty to acquit.

It is by law considered better that any number of guilty persons should escape than to adopt a course under which an innocent person might be convicted because of an erroneous conclusion of court or jury.

Hence it is that a defendant cannot be convicted unless his guilt is established by more than a preponderance of evidence. It is not enough that you should believe in his guilt to such an extent that would make you willing to act in the ordinary affairs of life, even

of the greatest importance. This will not do. Before you can find this defendant guilty, you must be satisfied of his guilt to a moral certainty and beyond a reasonable doubt.

DEFENDANTS' INSTRUCTION NO. 4 GIVEN:

Judge.

You are the sole and exclusive judges of the facts in this case, and of the credibility of the witnesses. Your power of judging, however, is not arbitrary, but must be exercised with legal discretion, and in subordination to the rules of legal evidence. You are not bound to believe the testimony of any witness unless such testimony imports verity, and establishes conviction in your minds, nor are you bound to decide in conformity with the declaration of any number of witnesses which do not produce conviction in your minds as against a lesser number, or against other evidence satisfying your minds. Every witness is presumed to speak the truth. This presumption may be repelled by the manner in which he or she testifies, by his or her interest in the case, if any is shown by the evidence, his or her partiality or impartiality, by the reasonableness or unreasonableness of any statements he or she makes, by his or her candor and fairness or lack thereof, and by any other fact or circumstance elicited during the trial which may aid you in determining as to whether the witness has spoken the truth.

DEFENDANTS' INSTRUCTION NO. 5
GIVEN:

JUDGE

The Jury is advised to acquit the defendants.

DEFENDANT'S INSTRUCTION NO. 6
GIVEN:

JUDGE

You are instructed that testimony with regard to verbal statements should be received with great caution. This evidence, consisting, as it does, in the mere repetition of oral statements, is subject to much imperfection and mistake in consequence of the person speaking not having clearly expressed his or her meaning, or, in consequence of the witness having misunderstood him or her, as the case might be. It frequently happens also that the witness, by unintentionally altering a few of the expressions really used, gives an effect to the statement completely at variance with what the person in fact did say. You are instructed that this kind of testimony should be scanned closely, and that it is to be received with caution.

DEFENDANT'S INSTRUCTION NO. 7
GIWEN:

Judge.

The Court charges you that if any witness has wilfully sworn falsely as to any material matter, it is

your duty to distrust the entire evidence of such witness.

DEFENDANT'S INSTRUCTION NO. 8
GIVEN:

Judge.

It is not your duty to look for some theory upon which to convict the defendant, but, on the contrary, it is your duty, and the law requires you, if you can reasonably do so, to reconcile any and all circumstances that have been shown with the innocence of the defendant, and so acquit.

DEFENDANT'S INSTRUCTION NO. 9
GIVEN:

Judge.

You are instructed that although you might find from the evidence the crime was in fact committed as charged in the information, yet, if any of you have a reasonable doubt as to whether or not these defendants committed or aided in the commission of such crime, then you must find the defendant not guilty.

DEFENDANT'S INSTRUCTION NO. 10
GIVEN:

You are instructed that you have a right to consider the fact that innocent men have been convicted, and

to consider the danger of convicting an innocent man, in weighing the evidence to determine whether there is a reasonable doubt as to the defendant's guilt.

DEFENDANT'S INSTRUCTION NO. 11
GIVEN:

_____

Judge.

You are instructed that mere probabilities are not sufficient to warrant a conviction in this case, nor is it sufficient that the great weight or preponderance of evidence supports the allegations of the Information; nor is it sufficient that upon the doctrine of chance it is more probable that this defendant is guilty than that he is innocent; but to warrant a conviction of the defendant in this case he must be proven guilty clearly and conclusively, and beyond a reasonable doubt. If it fails to establish beyond a reasonable doubt the guilt of the defendant in the manner and form as charged in the Information then it is the duty of the jury to acquit the defendant.

DEFENDANT'S INSTRUCTION NO. 12
GIVEN:

_____

Judge.

In considering the weight and effect to be given to the evidence of the defendant, you may consider his manner and the probability of his statements taken in connection with all the evidence in the case; and in judging of the defendant who has testified before

you, you are in duty bound to presume that he has spoken the truth, and unless that presumption has been legally rebutted, his evidence is entitled to full credit. If his testimony standing alone or taken in connection with other facts and circumstances in the case, raises a reasonable doubt in your minds as to his guilt, it will be your duty to act upon that doubt and acquit him.

DEFENDANT'S INSTRUCTION NO. 13 GIVEN:

Judge.

You must not suffer yourself to be prejudiced against the defendant because of the fact that he is charged with this offense, and you must not suffer yourself to be led to convict the defendant for fear that a crime may go unavenged, or for the purpose of deterring others from the commission of like offenses. No such argument or reason can be weighty enough to justify you in laying aside or ignoring that just and most humane rule of the law which says that you must acquit the defendant unless every fact necessary to establish his guilt has been proven to you beyond a reasonable doubt.

DEFENDANT'S INSTRUCTION NO. 14 GIVEN:

JUDGE.

For one person to abet another person in the commission of a criminal offense, means for him to know-

ingly and with criminal intent, aid, promote, encourage or instigate, by act or counsel, or both by act and counsel, the commission of such criminal offense.

DEFENDANT'S INSTRUCTION NO. 15
GIVEN:

Judge.

Every person on trial for a crime, until his guilt is established beyond a reasonable doubt, is presumed to be of good character in the absence of evidence impeaching the same; and, in this case he is presumed to be of good character for the traits involved, namely, for truth, honesty, integrity and as a law abiding citizen until such presumption is overcome by credible evidence in the case.

DEFENDANT'S INSTRUCTION NO. 16
GIVEN:

Judge

You are instructed that any of the statements, communications, acts or conduct of the witnesses in this action, between themselves or with other persons, cannot be considered by you as evidence tending to connect the defendants with the commission of the alleged offense; unless you find that such acts, communications, statements, or conduct were made or transpired in the presence of the defendant and were assented to by him, or were participated in by the defendant.

DEFENDANT'S INSTRUCTION NO. 17 GIVEN:

Judge

Each defendant herein is charged under one Count of this Information with knowingly, wilfully and unlawfully maintaining a building and place where intoxicating liquors, for beverage purposes, were kept, sold, and bartered in violation of law, and you are instructed that it is incumbent upon the government to prove that the liquors were so kept by the defendants in said building, charged in the information, for the purposes charged therein, and it is not sufficient for the government to show that certain intoxicants were found in the said building in the possession of others, but they must go further and show that the defendants had said intoxicants, if any, in their possession or control, or that they were there with the knowledge of defendants or either of them.

DEFENDANTS INSTRUCTION #18 GIVEN:

Judge.

You are instructed that in this case the law raises no presumption against the defendant, and the fact that he is charged with the crime alleged and that an Information has been filed against him is no evidence of his guilt and should raise no presumption of such act in the minds of the Jury, but every presumption of law is in favor of his innocence and in order

to convict him of the crime charged in the Information every material fact necessary to constitute such crime must be proved beyond reasonable doubt.

DEFENDANT'S INSTRUCTION NO. 19
GIVEN:

Judge

You are instructed that before you can convict the defendants in this case it must appear from the evidence beyond a reasonable doubt that the defendant and not somebody else, committed the crime charged in the information, if such offense was in fact committed. It is not sufficient that the evidence shows that the defendants or somebody else committed the crime, nor that the probabilities are that the defendant and not somebody else committed the crime, unless those probabilities are so strong as to remove all reasonable doubt as to whether the defendants or somebody else is the guilty party.

DEFENDANT'S INSTRUCTION NO. 20
GIVEN:

Judge.

[ENDORSED]: No. 6793-B Criminal U. S. DISTRICT COURT Southern District of California Southern Division United States of America vs. Herman Landfield, et al. FILED FEB 23 1925 Chas. N. Williams, Clerk Edmund L. Smith Deputy

IN THE DISTRICT COURT OF THE UNITED STATES, IN AND FOR THE SOUTHERN DISTRICT OF CALIFORNIA, SOUTHERN DIVISION.

THE UNITED STATES OF AMERICA, Plaintiff,

vs.

HERMAN LANDFIELD, J. W. OLIVER and JOHN DOE ELLIS, Defendants.

MOTION FOR NEW TRIAL.

AND NOW COME Herman Landfield and J. W. Oliver, defendants in the above entitled cause, by Warren L. Williams and Seymour S. Silverton, their attorneys, and move the Court to set aside the verdict rendered herein and to grant a new trial and for reasons therefor show to the court the following:

(1) The verdict is contrary to the law of the case.

(2) The verdict is not supported by any evidence in the case.

(3) The Court upon the trial of the case, above entitled admitted incompetent evidence offered by the United States, prejudicial to the rights of said defendants, moving herein.

(4) The court upon the trial of the above entitled case, excluded evidence competent to the case, offered by these moving defendants, to the prejudice of these defendants.

(5) The Court improperly instructed the jury to the prejudice of these defendants.

(6) The court improperly refused, to defendants, prejudice, to give correct instructions tendered by these defendants.

(7) The Court erred in refusing to direct a verdict of not guilty at the close of plaintiff's evidence.

(8) The Court erred in refusing to direct a verdict of not guilty at the close of all the evidence.

(9) The Court erred in its comments to the jury on the weight and character of the testimony.

DATED FEBRUARY 25th, 1925.

Warren L. Williams and
Seymour S. Silverton

Attorneys for defendants, Landfield and Oliver.

[Endorsed]: ORIGINAL No. 6793-B Dept.——— IN THE DISTRICT COURT OF THE UNITED STATES, IN AND FOR THE SOUTHERN DISTRICT OF CALIFORNIA, SOUTHERN DIVISION. THE UNITED STATES OF AMERICA, Plaintiff vs. HERMAN LANDFIELD, J. W. OLIVER, and JOHN DOE ELLIS Defendants. MOTION FOR NEW TRIAL Received copy of the within Motion for a New Trial this 25 day of Feb. 1925 Russell Graham Asst. U. S. Atty. Attorney for Plff. FILED FEB 25 1925 Chas. N. Williams, Clerk Edmund L. Smith Deputy WARREN L. WILLIAMS SEYMOUR S. SILVERTON 419 Ferguson Building 307 So. Hill Street LOS ANGELES, CAL. Bdwy. 7881 Attorneys for Moving Defendants.

IN THE DISTRICT COURT OF THE UNITED STATES, IN AND FOR THE SOUTHERN DISTRICT OF CALIFORNIA, SOUTHERN DIVISION.

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THE UNITED STATES OF AMERICA,	)	No. 6793-B Criminal
-vs- Plaintiff,	)	BILL OF EXCEPTIONS ON BEHALF OF HERMAN LANDFIELD and J. W. OLIVER, DEFENDANTS HEREIN.
HERMAN LANDFIELD, J. W. OLIVER and JOHN DOE ELLIS, Defendants.	)	

BE IT REMEMBERED, That heretofore, towit: on the 17th day of October 1924, an Information was filed in the above entitled Court against the defendants, HERMAN LANDFIELD and J. W. OLIVER, charging them, in five counts, with the violation of the National Prohibition Act of October 28, 1919, and thereafter, on or about the 17th day of November, 1924, the said Herman Landfield and J. W. Oliver appeared in said Court and were duly arraigned upon the said Information, and each entered his plea of "Not Guilty" to each and every count contained in said Information against said defendants, Landfield and Oliver; that thereafter, upon the 24th day of February, 1925, the said cause came on duly and regularly for trial, the plaintiff herein, The United States of America, being represented by E. T. McGann, Assistant United States

(Testimony of I. H. Cory.)

District Attorney for the Southern District of California, and the defendants herein, Herman Landfield and J. W. Oliver, being represented by Warren L. Williams and Seymour S. Silverton, Esqs. Thereupon the jury to try the cause was duly and regularly impaneled and the following proceedings took place on and during the trial.

The United States of America, to maintain the issues on its part, called as a witness, I. H. Cory, who being duly sworn, testified as follows:

(Reporter's Transcript—Pages 1 to 17).

TESTIMONY OF I. H. CORY, FOR THE GOVERNMENT.

My name is I. H. Cory, and I am a Federal Prohibition Agent, and was so employed on or about the 28th day of July 1924. At about that date I was at the Glendale Tavern, at Los Angeles County, and I saw the defendant, Landfield, at that time. I had business with the defendant, Landfield, at 11 o'clock P.M., that is, between 10 and 11. I went to the Glendale Tavern to make investigation there. I arrived there with Mrs. Cory and Agent Paul Hooke around a little after 10 in the evening.

The place is situated on San Fernando Boulevard, and faces the Boulevard, but the entrance is at the rear. We drove into the back and parked our automobile there and came up to the rear door and were met by a man by the name of Ellis. Ellis is a man of about 6 or 7 feet, slight build and blond, and he ap-

(Testimony of I. H. Cory.)

peared to be a kind of a greeter at the door. I had also seen Ellis prior to that time at a place on West Adams Street.

We checked our hats and coats there, and were seated at a table, and the waiter came up and asked what we wanted.

A. (Reporter's Transcript, Page 4, Line 8 to Page 4, Line 26).

(Witness continuing) "I told the waiter that we wanted to see the proprietor and he went away and very shortly Mr. Landfield came over. We had a table for four and I asked Mr. Landfield to take a seat, that I wanted to talk to him. He sat down in the empty chair and I took a card from my pocket, which had been given to me by a man by the name of George Cook, whom I afterwards arrested at this place.

THE COURT: What was that? I didn't catch that.

(Answer read)

MR. WILLIAMS: I move that the words "whom I afterwards arrested at this place" be stricken out as immaterial.

THE COURT: That may be stricken out.

A (Continuing) This card was an o.k. card, so called, and I handed it to Mr. Landfield—

MR. WILLIAMS: We object to any testimony concerning the card, on the ground that it is not the best evidence.

THE COURT: Overruled.

MR. WILLIAMS: Exception."

(Testimony of I. H. Cory.)

(Witness continuing) Mr. Landfield took the card and I told him that my name was Collins, and I said to him, "Here is a card from Mr. Cook, who works at Jimmie Christy's place on West Adams Street, and and if that is not satisfactory to you, ring up the place on West Adams Street, the phone number is on the card, and satisfy yourself that we are all right." Mr. Landfield asked me what I wanted and stated that he guessed I was all right. Before that we also had some conversation in which he told me he was Kid Herman who used to fight in South San Francisco, and I told him I didn't know much about the prize fighting game, but we were down there to have a good time, and he said he guessed we were all right, and asked me what I wanted, and I said, "Well, give us some gin fizzes." He said, "I don't serve any mixed-up drinks or straight drinks at the table, but I will get you the makings." So he went away across the dance floor, and went into a small room on the left hand side of the dance hall, on what I would call the north side of the building, and was gone a couple of minutes. Then he came back and beckoned me from the middle of the dance hall. I then got up and walked over to him, and he took me into this room which had no furniture in it at all, if my recollection is correct, except a certain kind of a kitchen table, one of those pine board tables, with possibly a chair, and he introduced me to Mr. Ellis. Mr. Ellis said, "Oh, that is the man that wanted the gin," and he gave me a White Rock bottle crowned with a crown cork so that it looked just the same as

(Testimony of I. H. Cory.)

a White Rock bottle, and Mr. Ellis said, "Here is the gin, this is the way we serve it," and I gave Mr. Ellis $5.00 for the bottle and put it in my pocket and went back to the table and joined my party. Landfield did not actually take the *mone,* but he was there. We then went back to the table and the *witer* came up to the table and brought a little silver bowl of powdered sugar, a pint bottle, I think it was a White Rock bottle, full of lemon juice, glasses, ice, and another bottle of White Rock, also a bottle of gingerale, which I had ordered for Agent Hooke, who didn't drink at all. I took the bottle of gin, which was in the White Rock bottle, out of my pocket and placed it on the table, and the waiter opened it and put some sugar and lemon juice and some of this gin into the glasses. During that visit we had two of these gin fizzes, I think, and I made some excuse and got out. The balance of the liquor I took with me to my hotel, took off the crown cork and put in a regular cork, and sent it to the Chemist for the Internal Revenue Department at San Francisco for analysis.

(Reporter's Transcript—Page 7, Line 25, to Page 9, Line 13)

"Mr. McGANN: Q Where did you first see that bottle, Mr. Cory?

A I first saw that bottle when Mr. Ellis handed it to me in the small room in the Glendale Tavern in the prsence of Mr. Landfield. I paid him $5.00 for it.

Q What date was that?

(Testimony of I. H. Cory.)

A It is marked here (indicating) "Date of buy 7/28/24." The 28th day of July. "Paid, $5.50."

Q Did you examine the contents of that bottle at the time?

A I drank two drinks out of it; yes, sir.

Q What was it?

A Gin.

MR. WILLIAMS: I object to that as calling for a conclusion of the witness, and no proper foundation laid for the question.

THE COURT: Do you know gin when you taste it?

A Yes, sir.

Q Have you had enough experience to know what it is if you taste it?

Yes, sir.

THE COURT: Overruled.

MR. WILLIAMS: Exception.

MR. McGANN: I will ask that this be admitted in evidence.

MR. WILLIAMS: I object to it on the ground that there is no proper foundation laid for its introduction.

THE COURT: In what way is there no proper foundation laid?

MR. WILLIAMS: No foundation laid in this: That the witness had not been properly qualified to testify as to what the contents of this bottle is.

THE COURT: It is a matter of common knowledge what gin contains. Did it contain more than one-half of one per cent of alcohol by volume?

(Testimony of I. H. Cory.)

A It did.

MR. WILLIAMS: I object to that on the ground that the witness is not qualified to testify to that.

THE COURT: Overruled.

MR. WILLIAMS: Exception.

THE COURT: All right. Go on."

(Witness continuing) The next time I went to the Glendale Tavern was on the 30th day of July, 1924; Agent C. W. Ahlin and my wife went with me.

(Reporter's Transcript—Page 10, Line 6, to Page 10, Line 11)

"A (Continuing) I sent for the proprietor through the waiter—

MR. WILLIAMS: I move that that be stricken out as immaterial and calling for a conclusion of the witness.

THE COURT: Denied.

MR. WILLIAMS: Exception."

(Witness continuing) Mr. Landfield again came to the table. I said to him, "Herman, this is Mr. Carlson from San Francisco. He is in the lumber business with the Hammond Lumber Company, and is down here to have a good time. He says he knows all of the prize fighters and everybody else. Cook knows him, and Jimmie Christy knows him, and everything is all right."

(Reporter's Transcript—Page 11, Line 4, to Page 13, Line 4)

(Testimony of I. H. Cory.)

"A (Continuing) Mr. Landfield again went back into the room where he had delivered me the gin, rather, where the gin was sold to me—

MR. WILLIAMS: I move that "where the gin was sold to me" be stricken out as immaterial.

THE COURT: Denied.

MR. WILLIAMS: Exception.

A (Continuing) He came out from the room and called Agent Ahlin over there, and Agent Ahlin went with him and came back to the table very shortly afterwards with a flask containing Scotch Whisky—

MR. WILLIAMS: Just a moment. Do I understand that Agent Ahlin came back, or Mr. Landfield?

A Agent Ahlin came back. We consumed a couple of—

MR. McGANN: Q I will ask you to examine this bottle, Mr. Cory.

A Yes, sir.

Q Where did you first see that bottle?

A I saw that bottle first when it came onto the table—rather, when Agent Ahlin took it out of his pocket in the Glendale Tavern.

Q Did you examine the contents at that time?

A I had a drink out of it, possibly two.

Q What would you say the contents of the bottle was?

MR. WILLIAMS: I object to that as immaterial, calling for a conclusion of the witness, and no proper foundation laid.

THE COURT: Overruled.

(Testimony of I. H. Cory.)

MR. WILLIAMS: Exception.

A I would say that it is Scotch Whisky.

THE COURT: Do you know Scotch Whisky when you taste it?

A Yes, sir.

MR. WILLIAMS: We object to his statement that he knows Scotch Whisky when he tastes it, and I renew my objection that the proper foundation has not been laid.

THE COURT: Some people, I suppose, know it. This witness says he does. Overruled.

MR. WILLIAMS: Exception.

MR Mc GANN: I ask at this time to introduce in evidence Government's Exhibit No. 2.

MR. WILLIAMS: The same objection. No proper foundation laid.

THE COURT: Overruled. In what respect is the foundation insuffiicent?

MR. WILLIAMS: It has not been shown what the bottle contains. It might be gingerale, from the color of it, for all we know.

THE COURT: I know, but color is not the only thing that goes into the consideration of what it is. If he said he looked at the color and said it was Scotch Whisky, that would be different, but he didn't do that. He said he tasted it. Overruled.

MR. WILLIAMS: Exception."

(Witness continuing) We stayed there a short time, and as soon as possible, got out of the place, and this bottle was taken back by Agent Ahlin and labeled by

(Testimony of I. H. Cory.)

himself, and it was also sent to the United States Chemist in San Francisco.

The third time I went there was, I believe, on the 28th day of August. I went there with a raiding crew.

(Reporter's Transcript—Page 13, Line 14, to Page 18, Line 10).

MR. Mc GANN: Q Who was present at the time of the raid?

A Agent Glynn, Agent Plunkett, Whittier, Hooke and Agent Cass from San Diego, and Agent Tyson, of the Los Angeles office. We went there on a search warrant which I had procured on affidavit before United States Commissioner Long, alleging these sales.

MR. WILLIAMS: I move it be stricken out as immaterial and not the best evidence.

THE COURT: Denied. It is harmless.

MR. WILLIAMS: Exception.

MR. Mc GANN: Q Then what did you do?

A We entered the place, and immediately the place was in an uproar.

MR. WILLIAMS: I move that be stricken out as a conclusion.

THE COURT: Denied. Harmless.

MR. WILLIAMS: Exception.

A (Continuing) And bottles were thrown to the floor and broken, bottles and glasses were thrown around, and one agent was assaulted, Agent Cass, I believe.

(Testimony of I. H. Cory.)

MR. WILLIAMS: I move that all of that be stricken out as calling for a conclusion of the witness.

THE COURT: Denied.

MR. WILLIAMS: Exception.

A (Continuing) During it all we succeeded in getting from the tables, or thereabouts, three bottles, two bottles of gin and one bottle containing Scotch Whisky, about half full. I arrested Mr. Landfield and Mr. Oliver, and this George Cook, who had given me the o.k. card from the first place, and who at that time was acting as a waiter for Mr. Landfield.

MR. WILLIAMS: I move that that answer be stricken out as immaterial and no foundation laid.

THE COURT: Denied.

MR. WILLIAMS: Exception.

A (Continuing) At that time I took Mr. Landfield and sat him down in a chair, and he got up and started to run around, and I sat him down again and told him I didn't want him to get up again or I would put the handcuffs on him, and that he had better be a little quiet. He said, "Well, I am not responsible for this stuff in my place." He said, "The guests brought it in and how am I going to keep them out?" I said, "Mr. Landfield, that is your business. If you have liquor that is in the quantity that is in this place, and let your guests bring it in, and you don't stop them, you are responsible, and the Federal Government are going to keep your place clean."

MR. WILLIAMS: We object to all of that and move that it be stricken out as immaterial.

(Testimony of I. H. Cory.)

THE COURT: Denied.

MR. WILLIAMS: Exception.

MR. Mc GANN: Q I will ask you to examine these three bottles.

A These three bottles were found in the premises at the time of the raid on the 28th day of August, it says here (indicating).

MR. WILLIAMS: I move that "it shows here" be stricken out as hearsay.

THE COURT: Denied.

MR. WILLIAMS: Exception.

A It is on the label here (indicating)

MR. Mc GANN: Q Now, did you examine the contents of the three bottles at that time?

A Yes, sir: I did.

Q What sort of an examination did you make, Mr. Cory?

A I sat at the table there making the return on the search warrant, and as the agents found the liquor they brought it over to me and I smelled it and tasted it to make sure what it was, and then I gave Mr. Landfield a return on the search warrant for them.

Q What did you find the contents of these bottles to be?

A These two bottles, so called "gin". This other bottle is Scotch Whisky.

MR. WILLIAMS: I move that that answer be stricken out on the ground there is no proper foundation laid, and calling for a conclusion of the witness.

(Testimony of I. H. Cory.)

THE COURT: Overruled.

MR. WILLIAMS: Exception.

MR Mc GANN: I ask at this time, if the Court please, that the three bottles, the two bottles of gin and the one bottle of Scotch Whisky, be accepted in evidence as Government's Exhibit No. 3.

MR. WILLIAMS: I object to their introduction as immaterial, and no proper foundation laid.

THE COURT: Are you still bothered with the color, or is it something else?

MR. WILLIAMS: The color looks quite natural. It looks like water.

THE COURT: In what respect is the foundation insufficient?

MR. WILLIAMS: This witness is not qualified.

THE COURT: You still know gin and whisky, do you?

A Yes, sir.

Q When you taste them?

A Yes, sir.

Q And you tasted those bottles?

A Yes, sir.

Q And it was gin and whisky?

A Yes, sir.

MR. WILLIAMS: I object to that and move that the answer be stricken out as immaterial, and object to the introduction of the testimony, on the same ground.

THE COURT: Denied.

MR. WILLIAMS: Exception.

(Testimony of I. H. Cory.)

MR. Mc GANN: Q You testified that the waiter brought you some lemon juice.

MR. WILLIAMS: Has the Government introduced these three bottles?

MR. Mc GANN: Yes.

MR. WILLIAMS: Has your Honor ruled upon their introduction?

THE COURT: Yes.

MR. WILLIAMS: I desire an exception to that ruling."

(Witness continuing) I do not know who the waiter was who brought the lemon juice and the cracked ice; I looked for him the night I made the raid and couldn't find him, a large man, I should judge five foot eleven. He is not a party to this case.

CROSS EXAMINATION

I have no memorandum to fix the time that I went to the Glendale Tavern. I do so from memory. I haven't any note. I have notes as to what occurred there, but they are in my grip. I refreshed my recollection from these notes in order to qualify to testify here today.

I went there under the name of Collins, which is not my name, and disguised myself by taking off my glasses and wearing a mustache. I have not seen Mr. Landfield before. I presented him with some kind of a card, and told him I was a regular fellow and wanted a drink. He was actually present when the liquor was delivered to me. He sat at the table when he told me he would give me the makings. I know what

(Testimony of I. H. Cory.)

liquors taste like for I have been a Federal Prohibition Agent for three years, during which time I have perhaps made a thousand purchases since prohibition went into effect. Before that I used to take a drink. I tasted the contents of this bottle by my wife and I drinking two gin fizzes. I drank what is missing from each bottle. I was not present when the test was made as to alcoholic content. I have not examined the contents of the bottle since it was returned from the Chemist. When the bottle was given to me in the presence of Mr. Landfield, it had an ordinary cork of a White Rock bottle, the same little cap that you take and open up like a gingerale bottle.

Mr. Ellis said to Mr. Landfield, "Yes, I know this is the gentleman that wanted the gin," and he gave me the bottle. It said "White Rock" on it, and so far as I know, it was an ordinary White Rock bottle. I know that it did not contain White Rock Mineral Water because he charged me $5.00 for it; it looks just the same as White Rock Mineral Water.

The bottle designated "Scotch Whisky" I did not get. Agent Ahlin got that; I do not know whether he got it from Mr. Ellis or not. I do not know where he got it. He was in the other room. The three bottles, Government's Exhibit 2, were not taken from the defendant, but they were taken from the table at that time.

We raided the place on the 28th of August, and as the agents rushed through the place, the liquor

(Testimony of I. H. Cory.)

was thrown from the tables on the floor, and bottles and glasses were broken by the guests.

Landfield was running around wild there, and I had to take him and sit him down twice. I heard about a young man there being beaten up; he assaulted Agent Cass, which resulted in his being struck. During the confusion, Mr. Landfield was running around. I sat Mr. Landfield down and I told him to sit down or I would have to put the hand cuffs on him. I told him if he did not sit down that I would knock him down. Everybody in the place seemed to have liquor on the tables or under the tables. I did not see any liquor on any of the tables; I just judged from general conditions.

I arrested a man by the name of Cook, and the Oliver and Landfield. I asked Mr. Landfield where Ellis was. He said he was not working there any more. I did not say that I had nothing on Mr. Landfield, and that if he would turn Ellis up, I would let him go.

On the 28th day of July, 1924, we went to the place and I handed a card of introduction from Mr. Cook to Mr. Landfield and I told him I was in the insurance business, and that George Cook would tell him that we were o. k. He told me that he was Kid Herman, the prize fighter, and told us if we were out for a good time, we ought to go to Catalina. He said he had three tickets for the flying boat which he would sell at half price. I almost bought the tickets

(Testimony of I. H. Cory.)

from him. Then we told him we wanted some gin fizzes, and he said he did not serve any straight drinks at the table, so he said he would get us the makings; and he went into this room across the dance hall. This is the room that I subsequently found out had one table and a chair in it. He later beckoned me over and he introduced me to Ellis. At that time Ellis was sitting in the little room. Ellis is five foot six or seven, not so very tall, dark complexion, black eyes, weighing, I should judge, about 175 or 180 pounds; at that time he wore a tuxedo. He had a dinner coat with a white shirt on, and a black tie in a bow.

I took the liquor back to the table and the waiter opened it and brought another bottle of real White Rock and a bottle of gingerale. I do not know where Mr. Ellis got this White Rock bottle. He had it with him, but he did not have it in his pocket, and I do not know where he got it.

I do not recall stating to Mr. Landfield that I wanted to see Mr. Ellis. I had seen Ellis before the 28th of August once, but I had never seen Mr. Landfield before. These three bottles I had never seen in the possession of the defendant Landfield. I took them from guests in the place.

(Reporter's Transcript—Pages 30, Line 15, to Page 48, Line 4).

(Testimony of Minnie E. Cory.)

TESTIMONY OF MRS. MINNIE E. CORY, FOR THE GOVERNMENT.

Mrs. Minnie E. Cory, called as a witness on behalf of the government, testified as follows:

I was at the Glendale Tavern on the 28th day of July, 1924 with Mr. Cory and Mr. Hooke. I saw the defendant, Herman Landfield at that time, but not the defendant, J. W. Oliver. I had no dealings with Mr. Landfield personally, but I witnessed the dealings. It was about 10 or 10:30 at night that we were there. A card was presented to Mr. Landfield, and Mr. Cory and Mr. Hooke asked if they could get some liquor. Mr. Landfield said that he couldn't serve them any drinks at the table. Mr. Landfield said that it was customary to get a bottle and serve lemon juice and White Rock water in bottles, and that we could mix our drinks at the table; that he would see that we got a bottle of gin.

Mr. Landfield left the table and very soon he came back and motioned to come out. When Mr. Cory returned he had the gin, and the lemon juice and White Rock Water and sugar was served at the table.

(Reporter's Transcript—Page 32, Line 18, to Page 33, Line 23.)

"Q I will ask you to examine this bottle and state whether you have ever seen it before?

A The bottle that the gin was served in was a bottle just like this, with a White Rock label on it.

(Testimony of Minnie E. Cory.)

MR. WILLIAMS: I move that the word "gin" be stricken out as calling for a conclusion of the witness, and no proper foundation laid.

THE COURT: Denied.

MR. WILLIAMS: Exception.

MR. Mc GANN: Q. Did you examine the contents of the bottle?

A Why, I sampled it, if that is what you want to know.

Q You tasted some of it, did you?

A Yes, sir.

Q How much?

A We made up a drink of gin fizz.

Q Do you know gin when you taste it?

A I think so.

Q Do you?

A Yes, sir.

Q Would you say it was gin that you drank at that time?

A I would say so; yes, sir.

Q It was taken from this bottle?

MR. WILLIAMS: I move that all of the witness's testimony as to the contents of the bottle be stricken out as calling for a conclusion of the witness, and no proper foundation laid, your Honor.

THE COURT: Denied.

MR. WILLIAMS: Exception."

(Witness Continuing) Mr. Landfield sat at the table quite a few minutes talking. I was there again

(Testimony of Minnie E. Cory.)

two nights later with Mr. Cory and Mr. Ahlin. I saw Mr. Landfield again. He came to the table and spoke, but he did not sit at the table this time. He stood there talking. Mr. Ahlin asked if he could get some liquor, and Mr. Landfield said he could accommodate him with some whisky, and when Mr. Ahlin came back he had the whisky.

(Reporter's Transcript—Page 34, Line 22, to Page 35, Line 20).

"Q I will ask you ever have seen this bottle before?

A It was served in a flask, a pint flask similar to that, and I presume that is the same bottle.

MR. WILLIAMS: I didn't hear that.

A I say, it was served in a pint flask and I presume that is the same bottle.

MR. WILLIAMS: I object to what the witness presumes as incompetent, irrelevant and immaterial, and no foundation laid.

THE COURT: Q Did it look like that bottle?

A Yes, sir; it was a plain bottle just like that.

MR. McGANN: Q Did you drink any of the contents out of that bottle at that time?

A I took just one drink.

Q You know that it was whisky?

A Yes, sir; it was whisky.

Q Were you there on any other occasion?

A No, sir.

Q Did you at any time see Mr. Oliver on your visits?

(Testimony of Minnie E. Cory.)

A I did not.

Q Did you know Mr. Landfield when you saw him?

A Yes, sir.

Q Is he in the court room now?

A He is sitting directly in back of his attorney.

MR. Mc GANN: Take the witness."

CROSS EXAMINATION.

Mrs. Cory testified on cross examination as follows:

I recognized Mr. Landfield here the first time I saw him. I have not refreshed my recollection particularly from any notes or from any conversation since the 28th day of July, 1924. My husband and I have only discussed my testifying here today as to whether I could remember the facts in the case. My husband, Mr. Cory, did not read me a statement of the case he had written up, and we have discussed the case here today approximately once.

From where we were seated on the 28th day of July, we could get a clear view of the dance hall. When we went in we had a card of introduction and we asked for Mr. Landfield. I am not a prohibition officer, and was not one on the 28th day of July, 1924. I just went with my husband. I expect they asked for Mr. Landfield, and they enquired as to where Mr. Landfield was from a waiter. I could not see if this man was the defendant, Oliver, or not.

I have seen Mr. Ellis, and I saw him before the 28th day of July, 1924. He is a man probably five foot ten, slender, light complected or light hair.

(Testimony of Minnie E. Cory.)

Mr. Cory asked Mr. Landfield if he knew where he could get anything to drink. Mr. Landfield said he could not serve any drinks, but that he could serve the makings. When my husband came back, he had a White Rock bottle, and later the waiter brought powdered sugar, cracked ice and things like that. Later on in the evening, Mr. Landfield stopped at our table and asked if everything was all right. He did not say anything about liquor.

We went there on the 30th, about 11 o'clock in the evening. Mr. Landfield came to our table and talked to us. Mr. Ahlin asked him if he could get us a bottle of whisky. Mr. Landfield said yes, and he motioned to Mr. Ahlin, and Mr. Ahlin went into another room, and when he came back, he had the whisky. It was a pint flask in a plain bottle. It was a similar bottle to the one the District Attorney handed me. I do not say it was the same bottle. I had some drinks out of it. It was Scotch whisky. I know the difference between Bourbon and Scotch whisky. There was no discussion between the parties there as to whether it was Scotch Whisky. Mr. Landfield did not say it was Scotch Whisky. The waiter did not say it was Scotch Whisky. I took one drink straight. Mr. Ahlin, I think, took the bottle away. I know that Mr. Landfield motioned for Mr. Ahlin to come out in the other room, and when he came back he had a bottle of Scotch Whisky. I do not recall whether Mr. Ahlin brought anything else or not. That was the only bottle I saw.

(Reporter's Transcript—Page 48, Line 7, to Page 59, Line 10.)

(Testimony of C. W. Ahlin.)

TESTIMONY OF C. W. AHLIN, FOR THE GOVERNMENT.

Mr. C. W. Ahlin, called as a witness on behalf of the government, testified as follows:

I am a Federal Prohibition Agent, and was so employed on the 30th day of July, 1924. I was at the Glendale Tavern, Los Angeles County, on said date, and I saw the defendants, Landfield and Oliver at that time. The defendant, Oliver, served us soft drinks at the table. All the conversation was with defendant Landfield; there was present at that time, Agent Cory, Mrs. Cory, Agent Hooke and myself. It was between 10:30 and 11 o'clock at night.

Mr. Cory introduced me to Mr. Landfield, telling me that he was the proprietor of the place. Mr. Cory introduced me as a friend of his from San Francisco, and told Mr. Landfield that I was all right, to give it to me. Then Mr. Ellis came to the table, and I was introduced to him.

(Reporter's Transcript—Page 50, Line 15, to Page 53, Line 19.)

"A Mr. Landfield was present, and a short time after that Mr. Ellis beckoned to me to come over to the little room off of the dance floor there and delivered me a pint bottle of Scotch Whisky, for which I gave him $5.00.

Q I will ask you if you have ever seen this bottle before (handing bottle to witness)?

A I have.

(Testimony of C. W. Ahlin.)

Q Where?

A It was bought out there at the Glendale Tavern from Mr. Ellis.

Q Is that the bottle you bought from Mr. Ellis?

A It is.

Q Where was the defendant Landfield when you bought that?

A In the premises some place.

Q Was he in your immediate presence when you purchased this from Mr. Ellis?

A I was in the room by myself with Mr. Ellis.

MR. WILLIAMS: I move that all of that testimony be stricken out on behalf of the defendants Landfield and Oliver.

THE COURT: Denied.

MR. Mc GANN: Q Did you examine the contents of that bottle at that time?

A We did.

Q What did you ascertain the contents of that Bottle to be?

A Scotch Whisky.

MR. WILLIAMS: W object to that as immaterial and no foundation laid.

THE COURT: Do you know Scotch Whisky when you taste it?

A Yes, sir.

Q Did you taste this?

A Yes, sir.

(Testimony of C. W. Ahlin.)

Q Was that Scotch Whisky?

A Yes, sir.

Q It was?

A Yes, sir.

MR. WILLIAMS: I move that that be stricken out as calling for the conclusion of the witness and no foundation laid.

THE COURT: Denied.

MR. WILLIAMS: Exception.

MR. Mc GANN: Q Were you at that address at any other time?

A I was out there at a later date.

Q What date?

A Around in October sometime.

Q What was the occasion of your visit?

MR. WILLIAMS: We object to any October visit on the ground that it is immaterial, and not within the time charged in this information.

THE COURT: Denied.

MR. WILLIAMS: The last date mentioned was October.

THE COURT: They are charged with maintaining a nuisance on or about the 29th day of August, and any time either before or after that, within a reasonable degree, would be relevant.

MR. WILLIAMS: We renew our objection to the October visit on the ground that it is too far removed, too remote, and incompetent.

THE COURT: Overruled.

(Testimony of C. W. Ahlin.)

MR. WILLIAMS: Exception.

MR. Mc GANN: Q What was the purpose of your visit?

A With Agent Bybee we visited these premises again and we then purchased liquor. This liquor was purchased by me of Oliver in the presence of Mickey Murphy, who was the main proprietor of the place at that time.

MR. WILLIAMS: I move that that all be stricken out as immaterial to the issues contained in this indictment.

THE COURT: Denied.

MR. WILLIAMS: Exception.

MR. Mc GANN:

Q What date was that, if you know?

A I don't just recall the date; I haven't got my records with me.

Q Now, where you there at any other time other than the two times you have mentioned?

A No, sir.

Q I take it you were not present at the time of the raid?

A I was not.

MR. Mc GANN: Take the witness."

CROSS EXAMINATION.

The rear of the house is really the front. As you go in, you enter a large reception room. You enter what you might call a dining room. There was quite a crowd of people seated on the sun porch on the

(Testimony of C. W. Ahlin.)

30th of July. I had seen Mr. Ellis before that date. After being introduced by Agent Cory to Mr. Landfield. He pointed to Mr. Ellis and brought him over there and introduced me to Mr. Ellis.

Mr. Cory told Mr. Landfield I was a lumberman from San Francisco, then Mr. Landfield called Mr. Ellis over. Mr. Landfield was present at the conversation between Mr. Ellis and myself. I told Mr. Landfield I wanted Scotch, and Landfield said yes, give it to me. Mr. Oliver brought some gingerale and Canada Dry Ale, but no sugar or cracked ice. I made a label on the bottle taken by me from the place.

The notation on that bottle there of July 30th, is in my hand writing. I know Scotch Whisky by the taste and I differentiated between Scotch Whisky and Bourbon by the taste of it. The alcoholic content is more than one half of one per cent. I know so from the effect and the feeling of it. Agent Cory and Mrs. Cory had two drinks a piece. Mr. Hooke does not drink.

And thereupon the defendants and each of them, by their counsel, moved the Court to direct the Jury to return a verdict of "Not Guilty" on each of said counts against each of said defendants upon the ground that no offense had been proven against either of these defendants, which said Motion was denied by the Court, to which ruling of the Court, said defendants then and there duly excepted.

(Reporter's Transcript—Page 60, Line 3, to Page 61, Line 15).

(Testimony of C. W. Ahlin.)

"THE COURT: All right, gentlemen, proceed, please.

MR. Mc GANN: The Government rests.

THE COURT: All right. Proceed.

MR. WILLIAMS: At this time, in compliance with the practice of this Court, I desire at this time to move, on behalf of the defendant, J. W. Oliver, as to Count 1 of this information, that the Jury be instructed to acquit the defendant, J. W. Oliver, on the ground—

THE COURT: The motion will be denied, and it may be considered as having been made on behalf of each of the defendants as to each count of the indictment, and denied.

MR. WILLIAMS: I would like to make my motion, if the Court please.

THE COURT: I said it might be considered as made to all defendants on all counts, and denied.

MR. WILLIAMS: I desire to move also as to Count 2—

THE COURT: I said it might be considered as having been made with respect to each defendant and as to each count, and denied.

MR. WILLIAMS: That includes counts 3, count 4 and count 5?

THE COURT: Yes, and denied. Proceed.

MR. WILLIAMS: Now, on behalf of the defendant, Herman Landfield, I desire to move this Court that the Jury be instructed—

(Testimony of Herman E. Landfield.)

THE COURT: It has been suggested, Mr. Williams, that—

MR. WILLIAMS: Wait a minute, if the Court please; I haven't made my motion.

THE COURT: I said it might be considered as to each defendant and each count, and the motion denied.

MR. WILLIAMS: I should like the Court to know there are five counts.

THE COURT: I know there are five counts, and it may be considered as made to five counts by each defendant, and denied.

MR. WILLIAMS: For the purpose of the record—

THE COURT: So now that ought to be understood, proceed.

MR. WILLIAMS: Very well. Mr. Landfield, take the stand, please."

Whereupon the defendants introduced the following testimony:

(Reporter's Transcript—Page 61, Line 17, to Page 75, Line 1).

TESTIMONY OF HERMAN E. LANDFIELD, FOR THE DEFENDANTS:

Herman Landfield, called as a witness on behalf of the defendants, testified as follows:

I am one of the defendants in the above entitled action, and I am now connected with the Simpson Automobile Parking Plant. My business on the 28th day of July, 1924, was Manager of the Glendale Tavern. I remember Mr. Cory and the little lady, but

(Testimony of Herman E. Landfield.)

I do not remember Mr. Ahlin. I remember Mr. Hooke; I saw them on the 28th day of July in the Glendale Tavern. At that time I had been charge of said Tavern for two days. When they came in, Mr. Hooke said, this is Mr. Collins and Lady, and I seated them as I would any guest.

They were seated on the sun porch, about 25 or 30 feet from the entrance. They asked for a drink, and I told them that my predecessor was fired for having liquor in the place, and that I was going to run that place as good as I possibly could, and I would not stand for any liquor being around there. That I had given my waiters strict orders not to sell any liquor; that I would not have any liquor around there. He said he wanted a little bit, and he said, "I would like to see that little fellow over there." Then I went over and asked the gentleman to their table. The gentleman was a guest there the same as Mr. Cory. The conversation between them was had in my absence. They ordered some gingerale and some White Rock water which the waiter brought over. I do not remember whether Mr. Oliver was the waiter or not, I honestly don't know, I don't remember.

A few days later I saw Mr. Cory and the little lady and Mr. Hooke. They tried to get liquor in the house, and I told them it was impossible for them to get any liquor from me or anybody connected with the place. Then they chatted with this gentleman over there. Mr. Ellis was the man. He was there that night. He is just a young chap, and would bring

(Testimony of Herman E. Landfield.)

in a lady friend to dance and eat. I was there for business, and I didn't know what he was there for.

This place is a high class restaurant. and it has five dining rooms, a five piece orchestra, and there are tables for guests in all these rooms.

I saw Mr. Cory the night of the raid. Mr. Cory came in with about six or seven men dressed in dark shirts and dark rimmed glasses. They came in as if they were going to hold up the place. I was on the dance floor and I came out to stop them. I said to them, "Nobody has committed any murder around here, why cause all of this?" Mr. Cory said, "You are under arrest". I then sat down, and there were no words after that.

These three bottles of liquor introduced in evidence, which purported to be bottles of Sandy Mac Donald Scotch and two bottles of gin were the contents of a lot of gin from different tables, and they poured it into those two bottles right in front of my very eyes. I said, "What are you taking that along for"? And Mr. Cory said, "Well, we will give you life for that." I never exercised the right of proprietorship or ownership over those three bottles. I didn't know they were in the house. Guests had brought them in there. Mr. Cory stated to me that if we turned Ellis up, he would let us go as he had nothing on us two boys.

I severed my connection with the establishment on the 30th day of September. I know nothing about the sale Mr. Cory testified about. I do not know what

(Testimony of Herman E. Landfield.)

these bottles contained. It might be gin, water or gasoline or anything else. I had no connection whatsoever with government exhibit No. 2, that is, the alleged bottle of Scotch.

CROSS EXAMINATION.

I never o.k.ed the sale of any liquor at all. There was never any liquor sold there to Mr. Cory or anyone else. I did not see Mr. Ahlin at any time. The first time I saw him was in this Courtroom here about a week ago. I haven't seen Mr. Ellis since the place was raided. I hadn't seen Ellis for three or four days after these people were in my place. He was just a guest there. I did not introduce Ellis to Mr. Cory. He knew Ellis before I did. I know nothing about the White Rock bottle containing gin or the pint flask containing whisky. I saw the officers gather it up, and they hit one fellow over the eye, and his eye puffed out, and they sat him at a table and talked to him a few minutes, and I asked the officers why they didn't take him down, because he had that Scotch. Mr. Cory said, "Well, he is a young fellow and we will let him go". One of the officers hit him and I came running in and there was about four of them on this poor fellow, and then I said that nobody had committed murder in the place. I don't know a thing about this liquor.

I have boxed for about eighteen years, and at one time held the championship of the World. Mr. Cory

(Testimony of Herman E. Landfield.)

asked me where I belonged, and I showed him my Masonic receipt.

Reporter's Transcript—Page 72, Line 11, to Page 72, Line 26.)

"THE COURT: Q Where is this place in Glendale?

A 1120 South San Fernando Boulevard.

Q Inside of the City of Glendale?

A Yes, sir.

Q All of these statements of these witnesses have made that they bought liquor there at your place from you or through you is all false?

A Absolutely, your Honor.

Q They have just come here and told a deliberate falsehood?

MR. WILLIAMS: We will have to object to that question, Your Honor, on the ground it is argumentative.

THE COURT: Overruled.

MR. WILLIAMS: Exception.

THE COURT: Q That is a fact, is it not?

A Yes, sir."

(Witness continuing) I had no proprietary interest in the place. It was my duty to run the place as a restaurant. We were getting $2.50 for our meals, and we served a wonderful chicken dinner. I had the waiters notify me when there was liquor brought around there, and I told the guests that they would have to refrain from bringing liquor in there or they

(Testimony of Herman E. Landfield.)

would have to quit coming there. I could not search the people, when I saw it, I would tell them not to bring any liquor around the place or on the premises.

We had officers come in from Glendale and look around and they never found anything while the place was under my supervision. I tried my best to keep liquor out.

We would turn away as many as 250 to 300 people on Saturday nights, our special night for dancing. No liquor was ever stored in the place to my knowledge. When I found liquor in their possession, I turned people out of there, or had them escorted out of the place.

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The above and foregoing was all of the evidence offered or received on the trial of the above entitled cause.

Defendants rest.

Thereupon, the defendants, by their counsel, move the Court to direct the Jury to return a verdict of "Not Guilty" for the reason that the evidence introduced did not show the defendants or either of them, to be guilty of any of the counts charged in the Information; which said Motion was denied by the Court, to which ruling of the Court defendants then and there duly excepted.

(Reporter's Transcript, Page 75, Line 3, to Page 75, Line 26).

"MR. WILLIAMS: The defendants rest, with this exception: I desire at this time to renew my motions

THE COURT: Denied.

MR. WILLIAMS: Just a moment. I haven't made my motions.

THE COURT: It may be considered as having been made and denied.

MR. WILLIAMS: For the purpose of the record I desire to make the motion on behalf of Defendants Landfield and Oliver.

THE COURT: It may be considered as having been made to each defendant on each count, the motion to dismiss on each count, and it is denied. Proceed.

MR. WILLIAMS: I desire to make my motion, if the Court please.

THE COURT: It may be regarded as having been made to each count and as to each defendant, and denied.

MR. WILLIAMS: Exception. On Count 3 there is no testimony to substantiate that count, and I move that that be dismissed.

THE COURT: Denied.

MR. WILLIAMS: I don't want to have any argument.

THE COURT: Any rebuttal?

MR. Mc GANN: No rebuttal."

And, thereupon, the Court charged the Jury, which said charge, together with the exceptions to the Court's rulings thereupon are as follows:

(Reporter's Transcript—Page 76, Line 14, to Page 94, Line 23).

"THE COURT: Gentlemen of the Jury, I will ask you to listen carefully to the instructions of the Court, which will guide you in your deliberations.

These defendants are charged with four different violations of the United States statute known as the Federal Prohibition law, enacted to bring about and make possible the practical and effective enforcement of the Eighteenth Amendment to the Federal Constitution, and it is charged in the first count that these defendants here on trial, and the other defendant who is not apprehended, John Doe Ellis, did knowingly, wilfully and unlawfully sell for beverage purposes to one I. W. Cory, one bottle of intoxicating liquor for $5.00; that on the 30th day of July they sold one C. W. Ahlin one bottle of intoxicating liquor for $7.00; on the 7th day of August they sold to one Paul Hook one bottle of intoxicating liquor for $7.00; and that, on or about the 29th day of August they had in their possession about three quarts and one pint of intoxicating liquor, and that on the same day, the 29th day of August, they were maintaining a common nuisance, towit, a room, building and place at Glendale Tavern, 1120 South San Fernando Boulevard, Los Angeles, County of Los Angeles, where intoxicating

liquor was then and there manufactured, kept, sold and bartered, for beverage purposes. And to these counts the defendants on trial, Landfield and Oliver, have interposed pleas of not guilty, and it is for you to say now, having heard the evidence, whether they have conducted themselves as alleged, or not.

Now, this information, of course, is no evidence itself against the defendants, the question is, what does the proof show. You are not to be prejudiced against the defendants because an information is on file; you are to arrive at a determination that shall be free from prejudice and passion, based fully upon a careful consideration of the evidence.

Now, there are two defendants here, and unless one of them shall be especially mentioned during the course of these instructions—and I refer to 'defendant'—you will understand that I am referring to both of them and each of them, remembering that each one stands upon his own feet; each one is to be convicted or acquitted, as the case may be, from a consideration of the evidence as it is applicable to him. The conviction or acquittal of one defendant, whichever it might be, would be of itself no evidence of the guilt or innocence of the other defendant. The question is in each case what evidence is relevant to each defendant whose guilt or innocence is under consideration, and what is the effect of that evidence.

Now, a lot has been said about the punishment in this case, very much of which is irrelevant, and much

of it without any basis of fact. What may have been done in some other case has nothing to do with this case. As a matter of fact, your function is to say whether or not the defendants have conducted themselves as alleged. When you have done that, then in pursuance of whatever verdict you have rendered, the judgment of the Court will be pronounced. If you say they are not guilty, the Court will send them forth free men, but if you say they are guilty, the Court, pursuant to the law and its duty under the law, which the Court cannot shift to anybody else, will pronounce such judgment which it thinks will suffice, in some degree at least, to maintain the dignity of the law of the land, which we are both sworn to uphold and protect. As a matter of fact, it is immaterial. There is not any question about punishment in the Federal Penitentiary for any of the offenses involved in this case, so do not let your minds be diverted by anything like that, because it is not a fact. Whatever punishment is provided is a matter for the Court, and I suggest that you confine yourselves to the consideration only of the question that is open for your consideration. Do not concern yourselves with the question of punishment. Yo do your duty, and then you just assume that the Court will try its very best with all the competency it possesses to do the duty that devolves upon it. I think you may with complete propriety trust that the good judgment and wise discretion, as much as this Court is able to command it,

will be execised in this case in pronouncing the judgment, if you find the defendant guilty.

You are instructed, also, gentlemen, of course, that you are the exclusive judges of the credibility of the witnesses whose testimony has been admitted in evidence, and of the effect and value of such evidence. It is for you to say what the worth and the weight of the evidence is. It is for you to say what the facts that are proved are. Your power in this regard, however, is not arbitrary, and should not be exercised capriciously, and it should not be exercised with prejudice or passion against anybody, but should be exercised with that calm due, honest, careful and disinterested consideration that ever ought to find its place and keep its abiding place in American jury rooms. Do not let your minds be diverted from such consideration by passion or prejudice, whatever source it may come, because that is a thing that ought not be permitted to intrude itself into your consideration or become one of the factors of your verdict when you arrive at it.

In this Court it is the privilege of the Court, and the Court may deem it its duty, to comment to the Jury upon the evidence in the case and express its opinion to the Jury upon the facts testified to here, and during the course of these instructions I may express to you some opinion in reference to the facts of the case. If I do, you are to remember at all times that you are in no wise bound by any expression of opinion

coming from the Court with respect to the facts of the case, because the law and the community both look to you and you alone for your own intelligent, independent judgment with respect to what the facts are.

Now, in arriving at your conclusion of the credibility of the witnesses, you will remember that every witness is presumed to speak the truth, but this presumption may be repelled by the manner in which the witness testifies, by his or her appearance upon the witness stand, by the character of the testimony given, that is, whether it is reasonable or unreasonable, probable or improbable, and whether it is in the nature of false or perjured testimony by him or her, as the case may be, or by evidence affecting his or her character for truth, honesty or integrity, or by his or her motives, his or her interest in the outcome of the case, or by any bias that may have been exhibited, or by contradictory evidence.

A witness may be impeached by the party against whom he or she was called, or by contradictory evidence, or by statements made inconsistent with his or her present testimony. If you believe that any witness has been impeached, or that the presumption of truthfulness attaching to the testimony of such witness has been repelled, then you will give the testimony of such witness such credibility as you may think it entitled to.

Now, in this case the defendant Landfield has offered himself as a witness in this case. That is his right, and you are to hear his testimony in accordance with the same rules I have given you with respect to other witnesses in the case, but with this addi-
factor [B. F. B.]
tional ~~effect~~, which is personal to him: That you
consider [B. F. B.]
are to ~~hear~~ his testimony in the light of the fact that he is a defendant in the case and in the light of the fact of his interest in the outcome of the case; ~~but~~ [B. F. B.] you are not entitled to disregard the testimony of a witness because such witness is a defendant. There would be no justice in that. But you
consider [B. F. B.]
are to ~~hear~~ the testimony of the defendant in the light
his [B. F. B.]
of the fact that he is a defendant and ~~is~~ interest in the case in consequence of that fact.

The defendant Oliver has not offered himself as a witness in the case, and that is his right, his Constitutional right. He is entitled to rest upon the weakness or insufficiency of the evidence offered by the Government, if any there be, which has been offered tending to show the commission of the crime. That is just as much his Constitutional right as to be tried by a jury. And you are not to comment among yourselves upon the fact that he did not testify, and you are not to permit that fact to be of any aid or assist-

ance or anything else, in arriving at a verdict one way or the other. The question is, What does the proof actually submitted before you in the case show: When you have considered the facts and determined their force, efficacy and value, then arrive at a verdict based upon such conclusion.

You are not bound to decide in conformity with the declarations of any number of witnesses which do not produce conviction in your minds, against a less number, or against a presumption or other evidence satisfying your minds.

This being a criminal case, the guilt of the defendants must be established beyond a reasonable doubt, and the burden of establishing such guilt rests upon the Government. The law does not require of the defendant that he prove himself innocent, but the law requires the Government to prove the defendant guilty in the manner and form as charged in the information beyond a reasonable doubt, and unless the Government has done this it is the duty of the Jury to acquit.

There are two classes of evidence recognized and admitted in courts of justice, upon either of which juries may lawfully find an accused guilty of crime. The first is direct or positive testimony of an eye-witness to the commission of the crime, one who himself saw the thing done which is itself a violation of the law; the other is testimony in proof of a chain of circumstances pointing sufficiently strong to the commission of the crime by the defendant to justify and require the conclusion that he is guilty, and that

is known as indirect or circumstantial evidence. Such evidence may consist of admissions by the defendant, plans laid for the commission of the crime, circumstances attendant upon its execution, efforts indulged [B. F. B.] and the like in to dispose of or conceal the fruits of the crime ∧ ; in short, any acts, declarations or circumstances admitted in evidence tending to connect the defendant with the commission of the crime. Where only [B. F. B.] the evidence is entirely, or even ∧ partly, circumstantial, yet is not only consistent with the guilt of the defendant, but inconsistent with any other rea- then [B. F. B.] sonable conclusion, ∧ the law makes it the duty of the jury to convict. Now, such indirect or circumstantial evidence, to which I have been referring, may arise from inferences and presumptions, or deductions from the facts proven, made by the Jury either because of the employment of their reason and experience, or made as presumptions because the law directs or says that they may be made from particular facts admitted in evidence. Inferences which are of large use in a case depending on circumstantial evidence, may only be made from facts legally proven to your satisfaction, and are such deductions from such facts as are warranted and justified by a consideration of the usual propensities and passions of men, the particular propensities and passions of the individual whose act is in question, the usual course of business and the course of nature.

The law presumes a defendant charged with crime to be innocent until proven guilty beyond a reasonable doubt. This presumption of innocence remains with the defendant and will of itself avail to acquit him unless it be overcome by proof of his guilt beyond a reasonable doubt. If you can reconcile the evidence before you upon any reasonable hypothesis consistent with the defendant's innocence you should do so, and in that case find such defendant not guilty. Now, a reasonable doubt about which we have been referring is just what it says. It is a doubt based on reason, and which is reasonable in view of all the evidence. After you have fairly, impartially, disinterestedly and without passion or prejudice considered the evidence and are unable to arrive at a conclusion as to what the truth is, if you have a reasonable doubt based upon that consideration, then you have such a reasonable doubt as requires you to bring in a verdict of not guilty. If after an impartial comparison and consideration of all of the evidence, or from a want of sufficient evidence on behalf of the Government to convince you of the truth of the charge, you can candidly say that you are not satisfied of the defendant's guilt, or if you have any misgivings about it, then you have a reasonable doubt and you should acquit him. But if, after such impartial comparison and consideration of all of the evidence you can truthfully say that you have an abiding conviction of the defendant's guilt, such as you would be willing to act upon in the more weighty and important matters relating to your own

affairs, then you have no reasonable doubt and you should convict him. By such reasonable doubt you are not to understand that all doubt is to be excluded. It is impossible in the determination of these questions to be absolutely certain. You men were not out there at this tavern on San Fernando Boulevard on these occasions in question. You cannot know with absolute certainty just exactly what did take place. You are required to decide the question submitted to you upon the strong probabilities of the case, and to justify a conviction, the probabilities must be so strong as, not to exclude all doubt or possibility of error, but as to exclude reasonable doubt. ~~and~~ [B. F. B.] As long as you have a reasonable doubt of a defendant's guilt you may not convict him. When, however, weighing all of the evidence, you have an abiding conviction and belief that the defendant is guilty, it is your duty to convict, and no sympathy, sympathy for him or for his family, if he have one, or for his plight, or anything of that sort, justifies you in seeking for doubts by any strained or unreasonable construction or interpretation of the law or evidence or facts.

Now, it is also the law, gentlemen, relevant to the matters to be submitted to you, that whoever directly commits any act constituting an offense defined in any law of the United States, or aids, abets, counsels, induces, or procures its commission, is a principal and is to be prosecuted and punished just exactly as the principal is. That means that while it may be true

that one man himself does the thing which the law denominates may not be done: one man sells the liquor, one man goes and gets the liquor, or one man does something else to bring about the consummation of the [B. F. B.] transaction which is forbidden by the law, and another man aids, abets, counsels, commands, induces or procures the commission of the crime and knowingly helps to make it possible to be done, and knowingly helps to contribute to its success, then he is just as guilty as the other man, because it cannot be said that one man handles the money and the other gets the liquor and that he can, for that reason, be the only one that is guilty. As I have indicated to you, whoever aids, abets, commands, induces or procures the doing of that thing is just as responsible and is just as much subject to prosecution and punishment as the one who commits the offense.

Now, the National Prohibition Law, under which these men are prosecuted, provides, among other things: 'When used in this Title the word 'liquor' or the phrase 'intoxicating liquor' shall be construed to include alcohol, brandy, whisky, rum, gin, beer, ale, porter, and wine, and in addition thereto any spirituous vinous, malt or fermented liquor, by whatever name called, containing one-half of one percentum or more of alcohol by volume, which are fit for use for beverage purposes.' It is further provided that: 'No person shall on or after the date when the Eighteenth Amendment to the Constitution of the United States goes into effect, manufacture, sell, barter, transport, import, export, deliver, furnish or possess any intoxi-

cating liquor except as authorized in this act.' And the only authorization in the Act was the authorization for non-beverage purposes, such as for medicinal, scientific and sacramental purposes. That is not involved here at all. No one has suggested that this liquor was used for those particular purposes. The only other

authorized [B. F. B.]

thing ~~involved~~ in the Act is liquor lawfully used in your own home, and which was lawfully acquired before the Eighteenth Amendment went into effect, and therefore subject to the use of yourself and your friends who can stand it and take the chances with you. That is not involved here, and you are not to concern yourselves about that. Then it is also provided: 'That any room, house, building, boat, vehicle, structure or place where intoxicating liquor is manufactured, sold, kept or bartered in violation of this Act, and all intoxicating liquor and property kept and used in maintaining the same, is hereby declared to be a common nuisance and any person who maintains such a common nuisance shall be guilty of a misdemeanor . . . ' and punished as provided by law.

Now, so much, gentlemen, as to the law involved in the case, just a word or two as to the facts: These defendants are charged in three counts with having sold liquor, and one count with having possession of liquor, and in the remaining count of having maintained a nuisance. Now, it is true as to the third count, as I remember the evidence, there is not any evidence of a sale of liquor under and pursuant to the terms of that count, so, as to that count, I think it is your plain

duty to return a verdict of not guilty. There is no evidence as to the matters charged in that count. Now, there is evidence in the case—the weight of the sufficiency of it is for you, of course—as to the other remaining counts, and it is your duty to determine the guilt or innocence of the defendants in respect to them also. Now, if you believe the testimony of the Government agents who went out to this place, as they say, and as they say, made purchases of liquor there at that place, and that the defendant Landfield, who was apparently in charge in some capacity, aiding, abetting and cooperating, and making it possible for the liquor to be purchased, if you believe that, and believe it beyond a reasonable doubt, that it is a fact, why, of course, he is just as responsible as if he himself had produced the liquor and sold the liquor and taken the money, carried the liquor and did everything about it; and if the defendant Oliver, as testified by some of the witnesses, cooperated, collaborated with that and knew what was going on, and contributed to it, aided and abetted in so far as he did, why, he would be guilty, of course, of the thing with respect to which he did cooperate and collaborate, remembering, of course, that the guilt of a person has to be determined by what that person does and not by what some other person does or says.

Then with respect to the counts charging possession: There is testimony that the officers went out there on this night of the so-called raid, and they found these three quarts of liquor. If, under all of the circumstances of the case, you believe that liquor

was being sold there by these defendants, as testified to by the officers who went there on this occasion, and if you believe from all the circumstances presented in the evidence that the people who had liquor there were people who had bought liquor, as the officers have testified they bought it previously, and the defendants knew that, then, of course, they would be responsible for the liquor on the premises and should be found guilty as charged, if you believe that beyond a reasonable doubt. By the same token, if you believe that these defendants either or both of them, cooperating together or acting independently, were maintaining that place out there as it has been referred to [B. F. B.]

~~admitted~~ by somebody in the evidence, that it was a high class restaurant, if you believe it was maintained and the persons maintaining it, either in the position of waiter or manager or otherwise, were maintaining it as a place where liquor could be kept and sold, of course, it would be maintained and kept in violation of law and the maintaining of the place would be a common nuisance and you should find the persons maintaining that place guilty as charged, if you believe that was the fact beyond a reasonable doubt.

Now, the defendants—at least the defendant Landfield—meets the charge against him by testimony to the effect that he did not know there was any liquor there at any time; that he didn't sell any liquor and was not a party to the sale of any liquor and did

not know that liquor was being sold. Now, if you [B. F. B.] or have believe that from all of the evidence ~~and beyond~~ a as to whether [B. F. B.] reasonable doubt ~~that~~ that is the case, you should acquit him, because no man ought to be convicted for something that takes place, even if it takes place in his own house and he had no knowledge of it. I say, you cannot convict him in that event, because there would be no justice in that,—if he did not know it was being done, and that it took place without his privity or criminal cooperation;—if you [B. F. B.] or have a reasonable doubt as to whether believe that is a fact ~~and believe it beyond a reasonable doubt~~ the defendants were ignorant of what was going on, ignorant of the fact that liquor was there on this occasion, ignorant of the fact that liquor was being maintained there, (if you believe that liquor was being maintained there), and ignorant of the fact that sales were being made, (if sales were being made), you should acquit them, because you could not then believe beyond a reasonable doubt that they were responsible for the things that took place there with respect to the sale of liquor and the maintenance of a place where liquor was kept and sold. So it comes down finally, gentlemen, to a question of whom you are going to believe.

There has been some slight suggestion—I say slight [B. F. B.] in argument suggestion, it was rather lengthily elaborated upon, ^

to the effect that you don't know whether the stuff in these bottles contains more than one-half of one percent of alcohol by volume. I think it hardly worth the time of the Court to elaborate upon that. It could easily be true that somebody might have diffi-

whether [B. F. B.]

culty in saying ~~what~~ near beer or beer or some other similar substance might or might not contain one-half of one percent or more of alcohol, or thereabouts, but it would hardly seem that anybody with any experience at all, anybody that was not born day before yesterday, could not tell what gin and whisky is. That is what the testimony is, that it was gin and whisky. That is all the testimony is, that gin and whisky was purchased. So, gentlemen, don't let your minds be diverted by any unsubstantial, specious argument like that. It is for you to say what the facts are, what the proof is, and you cannot convict the defendants if you do not believe they sold these things containing more than one-half on one percent of alcohol. If they did sell it, it would be hardly reasonable to conclude that they were selling something that contained less than one-half on one percent of alcohol; it would hardly be reasonable to believe that an article of that kind was sold for $5.00 and $7.00 a bottle, if you find it was sold for that, so the whole thing, after you simmer it down, depends upon whether you believe these officers or agents or the defendants. The defendant Landfield says that ~~the officers~~ [B. F. B.] the testimony given by the officers was an out and out

falsehood, plain perjury. That is the case if his story is to be accepted:—that he didn't know of the sales [B. F. B.] that being made and didn't participate in the sales; ~~then~~ these officers have come here and deliberately perjured themselves; because there cannot be any question under the circumstances but that they went there on these occasions and that they there met and talked with the defendant. No doubt about that. It is hardly a case of mistaken identity or mistaken location. So it is just a question of what you are going to conclude. Are you going to conclude that these officers have come here and deliberately perjured themselves, or are you going to conclude that the defendant, for the purpose of removing the consequences of his own wrong doing, if he did do wrong, has testified falsely in order to escape the consequences. Both of them cannot be telling the truth. You have to determine one way or the other as to where the truth lies. You have to be [B. F. B.] come to a conclusion that will ∧ fair under all of the circumstances, free from prejudice, giving the thing the calm, deliberate, careful and close consideration that it requires at your hands, and that it is your duty to give it, remembering that if you have a reasonable doubt of the guilt of the defendants of course you should acquit them, but if you believe beyond a reasonable doubt that they have conducted themselves as alleged, either of them, it is your plain duty to convict them. Any exceptions to the charge?

"MR. WILLIAMS: On behalf of the defendants, I desire to note an exception to your Honor's charge, and the whole thereof, and in particular to the charge as to the Court's duty in commenting on the evidence; also I desire to note an exception to your Honor's charge as to the impeachment of witnesses; I also desire to note an exception to your Honor's charge on the interest of the defendant Landfield. I also desire to note an exception to your Honor's charge and comment on principal and accessory, aider and abetter. I also desire to note an exception as to the defendant Oliver. I also desire to note an exception to the instruction and comment on the possession of the liquor. I also desire to note an exception to the comment and instruction as to the alcoholic content of the alleged liquor. I also desire to note an exception to the comment and instruction as to the testimony of the Government officers. I also desire on behalf of the defendants to note an exception to the failure of the Court to give the instructions requested by the defendants.

THE COURT: Your verdict will be in the usual form, which has been prepared for your convenience by the Clerk. When you have arrived at a verdict, if you do, your foreman will sign the same and return it into open court. I will ask you to retire with the officer."

Which said charge of the Court above set forth comprises all of the instructions given to the Jury in said cause.

Whereupon the defendants requested the following instructions, which instructions were refused by the Trial Court, to which refusal, defendants objected and excepted.

"The fact that the defendants, Landfield and Oliver, were friendly, or even intimately friendly, with the defendant, Ellis, is not a circumstance in itself to be considered against them, neither is it sufficient to show that these defendants were involved with the said Ellis in the commission of said offense, if any was committed, but the prosecution must connect the defendants, Landfield and Oliver in some way with the commission of the alleged offense and no presumption is to be indulged in against them because the evidence may point to the guilty of the co-defendant, Ellis.

DEFENDANTS' INSTRUCTION NO. 3

Judge."

* * * * * * * * * *

"For one person to abet another person in the commission of a criminal offense, means for him to knowingly and with criminal intent, aid, promote, encourage or instigate, by act or counsel, or both by act and counsel, the commission of such criminal offense.

DEFENDANTS' INSTRUCTION NO. 15

Judge."

* * * * * * * * * *

"Each defendant herein is charged under one Count of this Information with knowingly, wilfully, and

unlawfully maintaining a building and place where intoxicating liquors, for beverage purposes, were kept, sold, and bartered in violation of law, and you are instructed that it is incumbent upon the government to prove that the liquors were so kept by the defendants in said building, charged in the information, for the purposes charged therein, and it is not sufficient for the government to show that certain intoxicants were found in the said building in the possession of others, but they must go further and show that the defendants had said intoxicants, if any, in their possession or control, or that they were there with the knowledge of defendants or either of them.

DEFENDANTS' INSTRUCTION NO. 18.

Judge."

And thereupon, towit: February 24, 1925, the Jury returned a verdict of "Guilty", finding the defendant, Landfield "Guilty" upon the first, second, fourth and fifth counts in said Information contained; and the said defendant, Oliver, "Guilty" of the offenses set forth in the fourth and fifth counts of the Information.

That the time for sentencing the said defendants was continued by the Court to the 25th day of February, 1925, upon which date a Motion for a New Trial was filed and argued in behalf of each defendant, for the reason set forth in said Motion for a New Trial, towit: That the evidence was insufficient to show either of the defendants guilty of the offenses charged against them in said Information aforesaid,

and thereupon, the Court having heard the Motion of said defendants for a New Trial, made its Order denying said Motion, to which ruling, the exception of the defendants and each of them was duly made and entered, and thereupon the Court rendered its Judgment and Sentence upon said Verdict, which Judgment and sentence is as follows:

That the defendant, Landfield, upon the first Count in said Information contained, be adjudged and sentenced to serve a term of six (6) months in the Orange County Jail, in the County of Orange, State of California, to serve a term of six (6) months in the Orange County Jail, in the County of Orange, State of California, upon the second Count in the said Information in the above entitled action, and to pay a fine of One Dollar, ($1.00) upon the fourth Count in said Information in the above entitled cause contained, and upon the fifth Count of said Information contained, that said Herman Landfield be adjudged and sentenced to serve a term of one (1) year in the Orange County Jail, and to pay a fine of One Thousand Dollars, ($1,000.00), said Herman Landfield to be committed until the payment of said fines, and the said Judgment against the said Herman Landfield upon the first second and fifth Counts, as far as same relate to imprisonment, to be served concurrently; and said above entitled Court did then give and render and make its Judgment against the defendant herein, J. W. Oliver, whereby said defendant, J. W. Oliver was adjudged and sentenced upon the fourth Count in said

Information contained, to pay a fine of One Dollars, ($1.00) and to be committed until said fine was paid; and upon the fifth Count in said Information contained, to be confined in the Orange County Jail in the County of Orange, State of California for the period of six (6) months, to which sentence, the exceptions of the defendants were duly taken and allowed.

That the Court instructed the Jury to bring in a verdict of "Not Guilty" on the third Count in the Information contained, as to both defendants, and that the Jury brought in its verdict finding the defendants "Not Guilty" on said third Count in said Information contained.

That thereupon, on the 5th day of March, 1925, the defendants duly and regularly filed in said Court their Petition for a Writ of Error, and concurrently therewith, their Assignment of Errors. That the Court at said time allowed said Writ of Error and fixed a Supersedeas Bond upon Appeal in the sum of ten thousand ($10,000.00) dollars, for the defendant, Landfield, and for the defendant, Oliver, in the sum of five thousand ($5,000.00) dollars.

That thereupon, and on the 5th day of March, 1925, a Writ of Error was duly issued in said cause, returnable before the United States Circuit Court of Appeals, for the Ninth Circuit.

That thereupon, towit: March 7th, 1925, Citation upon said Writ of Error was duly issued, served upon the United States District Attorney and filed with the Clerk of said Court.

The Information, Petition for a Writ of Error, Assignment of Errors, Motion for New Trial, and the various Orders and proceedings of the Court referred to herein, are fully set out in the printed record on appeal of the Clerk, to be filed herein and ordered to be printed herewith.

And, for as much as the evidence and proceedings and matters of exception above set forth do not fully appear of record, the defendants, by their attorneys, tender this Bill of Exceptions and pray that the same be signed and sealed by the Court herein, pursuant to the statute in such case made and provided.

Warren L Williams
Seymour S Silverton
Attorneys for Appealing Defendants.

PRESENTATION OF BILL OF EXCEPTIONS, NOTICE THEREOF AND STIPULATION FOR SETTLEMENT AND ALLOWANCE.

Defendants herein, Herman Landfield and J. W. Oliver, hereby present the foregoing as their Bill of Exceptions herein and respectfully ask that the same may be allowed.

Warren L. Williams
Seymour S Silverton
Attorneys for Appealing Defendants.

TO S. W. Mc NABB, ESQUIRE, UNITED STATES DISTRICT ATTORNEY FOR THE SOUTHERN DISTRICT OF CALIFORNIA:

You will please take notice that the foregoing constitutes and is the proposed Bill of Exceptions from

the defendants in the above entitled action, and the said defendants will ask for allowance of the same.

Warren L Williams
Seymour S Silverton
Attorneys for Appealing Defendants.

Service of the foregoing Bill of Exceptions is hereby acknowledged this 9th day of March, 1925

S W McNabb, U. S. Attorney
Eugene T. McGann
Spec. Asst UNITED STATES DISTRICT ATTORNEY FOR THE UNITED STATES OF AMERICA.

STIPULATION AS TO CORRECTNESS OF BILL OF EXCEPTIONS.

It is hereby stipulated that the foregoing Bill of Exceptions contains a statement of all the evidence adduced at said trial, together with the complete charge of the Court to the Jury and other matters therein set forth, and that the same is correct and may be settled and allowed by the Court.

Warren L Williams
Seymour S Silverton
Attorneys for Appealing Defendants.
S W McNabb
U. S. Attorney
Eugene T. McGann
Attorney for United States of America.

ORDER ALLOWING BILL OF EXCEPTIONS AND MAKING THE SAME PART OF THE RECORD.

The foregoing Bill of Exceptions having been duly presented to the Court, the same is hereby duly allowed and signed and made a part of the records in this cause.

March 12, 1925

Bledsoe

Judge

DATED: This ——— day of March, 1925.

_____

Judge.

* * * * * * *

[ENDORSED]: No. 6793-B Criminal IN THE DISTRICT COURT OF THE UNITED STATES, IN AND FOR THE SOUTHERN DISTRICT OF CALIFORNIA, SOUTHERN DIVISION. THE UNITED STATES OF AMERICA, Plaintiff -vs- HERMAN LANDFIELD, J. W. OLIVER and JOHN DOE ELLIS, Defendants. BILL OF EXCEPTIONS ON BEHALF OF HERMAN LANDFIELD and J W OLIVER DEFENDANTS HEREIN. Received Copy of Within this 9th day of March, 1925. S. W. McNabb U. S. Attorney. Eugene T. McGann Spec. Asst. U. S. Atty. FILED MAR. 13 1925 CHAS. N. WILLIAMS, Clerk Murray E. Wire Deputy WARREN L. WILLIAMS S. S. SILVERTON 419 Ferguson Bldg. 307 So. Hill Street LOS ANGELES, CAL. Bdwy. 7881 Bdwy. 7880 Attorneys for Defendants, Landfield and Oliver

IN THE DISTRICT COURT OF THE UNITED STATES, IN AND FOR THE SOUTHERN DISTRICT OF CALIFORNIA, SOUTHERN DIVISION.

- - - - - - - - -

THE UNITED STATES OF AMERICA,	) NO. 6793-B Criminal)
-vs- Plaintiff,	) ASSIGNMENT OF) ERRORS ON BE-
HERMAN LANDFIELD, J. W. OLIVER and JOHN DOE ELLIS,	) HALF OF LAND-) FIELD and OLIVER.) DEFENDANTS) HEREIN
Defendants.	))

Come now HERMAN LANDFIELD and J. W. OLIVER, two of the defendants above named, and file the following Statement and Assignment of Errors, upon which they, and each of them, will rely in the prosecution of a Writ of Error of the above entitled cause, a Petition for which Writ on behalf of both the defendants, Herman Landfield and J. W. Oliver, is filed at the same time with this Assignment, which Assignment of Errors, these defendants allege, occurred upon the trial of the above entitled cause.

I.

The trial Court erred in admitting incompetent evidence and secondary evidence, to defendants prejudice in this, towit:

That the Court permitted Government witness, I. H Cory, to testify as to the contents of a certain card without introducing the said card in evidence, or pro-

ducing the same, which questions, objections, answers and exceptions are as follows:

"A (Continuing) I told the waiter that we wanted to see the proprietor and he went away and very shortly Mr. Landfield came over. We had a table for four and I asked Mr. Landfield to take a seat, that *i* wanted to talk to him. He sat down in the empty chair and I took a card from my pocket, which had been given to me by a man by the name of George Cook, whom I afterwards arrested at this place.

THE COURT: What was that? I didn't catch that.

(Answer Read)

MR. WILLIAMS: I move that the words "whom I afterwards arrested at this place" be stricken out as immaterial.

THE COURT: That may be stricken out

A (Continuing) This card was an o.k. card, so called, and I handed it to Mr. Landfield—

MR. WILLIAMS: We object to any testimony concerning the card, on the ground that it is not the best evidence.

THE COURT: Overruled.

MR. WILLIAMS: Exception."

(Reporter's Transcript—Page 4, Line 8, to Page 4, Line 26.)

Without laying any foundation for the admission of said testimony, and upon the objection being made by the defendants that the evidence was not the best evidence, the defendants hereby assign the admission of said testimony in evidence as prejudicial error for the

reason that it was so highly prejudicial in its character that, in view of all the other evidence in the case, it is shown that by its admission, the jury was led to convict the defendants by reason of passion and prejudice, and not upon the legal evidence introduced at the trial of said cause, and the objections of the defendants to such questions, and their exceptions to the ruling of the Court were duly taken and allowed.

II.

The trial Court erred in admitting incompetent evidence, to defendants' prejudice in this, towit:

That the Court permitted the government witness, Cory, to testify over the objections of the defendants that a certain bottle contained gin, and permitted the said bottle to be introduced in evidence over the objection of the defendants that no foundation had been laid for the admission of said testimony, and for the introduction of said Exhibit, which questions, objections and answers are as follows, towit:

"A I first saw that bottle when Mr. Ellis handed it to me in the small room in the Glendale Tavern in the presence of Mr. Landfield. I paid him $5.00 for it.

Q. What date was that?

A It is marked here (indicating) "Date of buy 7/28/24." The 28th day of July, 1924. "Paid, $5.50."

Q Did you examine the contents of that bottle at the time?

A I drank two drinks of it; yes, sir.

Q What is it?

A Gin.

MR. WILLIAMS: I object to that as calling for a conclusion of the witness, and no proper foundation laid for the question.

THE COURT: Do you know gin when you taste it?

A Yes, sir.

Q Have you had enough experience to know what it is if you taste it?

A Yes, sir.

THE COURT: Overruled.

MR. WILLIAMS: Exception.

MR. Mc GANN: I will ask that this be admitted in evidence.

MR. WILLIAMS: I object to it on the ground that there is no proper foundation laid for its introduction.

THE COURT: In what way is there no proper foundation laid?

MR. WILLIAMS: No foundation laid in this: That the witness has not been properly qualified to testify as to what the contents of this bottle is.

THE COURT: It is a matter of common knowledge what gin contains. Did it contain more than one-half of one per cent. of alcohol by volume?

A It did.

MR. WILLIAMS: I object to that on the ground that the witness is not qualified to testify to that.

THE COURT: Overruled.

MR. WILLIAMS: Exception.

THE COURT: All right. Go on."

(Reporter's Transcript—Page 8, Line 1, to Page 9, Line 13.)

Without laying any foundation for the admission of said testimony, and upon the objection being made by the defendants that the evidence was not the best evidence, the defendants hereby assign the admission of said testimony in evidence as prejudicial error for the reason that it was so highly prejudicial in its character that, in view of all the other evidence in the case, it is shown that by its admission, the jury was led to convict the defendants by reason of passion and prejudice, and not upon the legal evidence introduced at the trial of said cause, and the objections of the defendants to such questions, and their exceptions to the ruling of the Court were duly taken and allowed.

III.

The trial Court erred in admitting incompetent evidence to defendants' prejudice, in this, towit:

In that the government witness, Cory, was permitted to express his conclusion as to the proprietor of said Cafe, objection being made upon the grounds that said evidence called for a conclusion of the witness, which questions, objections, Answers and exceptions are as follows:

"MR. WILLIAMS: Exception.

A (Continuing) I sent for the proprietor through the waiter—

MR. WILLIAMS: I move that that be stricken out as immaterial and calling for a conclusion of the witness.

THE COURT: Denied.

MR. WILLIAMS: Exception."

(Reporter's Transcript—Page 10, Line 5 to Page 10 Line 11)

The admission of which evidence over the objection of these defendants, these defendants hereby assign, in view of the other evidence in this case, as highly prejudicial to these defendants.

IV.

The trial Court erred in admitting incompetent, immaterial and irrelevant evidence to defendants' prejudice, towit:

That the Court refused to strike out on Motion of the defendants, certain statements made by plaintiff's witness, I. H. Cory, which questions, objections, answers and exceptions are as follows:

"A (Continuing) Mr. Landfield again went back into the room where he had delivered me the gin, rather, where the gin was sold to me—

MR. WILLIAMS: I move that "where the gin was sold to me" be stricken out as immaterial.

THE COURT: Denied.

MR. WILLIAMS: Exception."

(Reporter's Transcript—Page 11, Line 4, to Page 11, Line 10.)

The admission of which evidence over the objection of the defendants, and the Court's refusal to strike the same out, but to permit said answers to remain in the record, these defendants hereby assign, in view of the other evidence in this case, as highly prejudicial to themselves.

V.

The trial Court erred in admitting incompetent evidence and evidence calling for the conclusion of the witness without proper foundation being laid for its admission, to be introduced, to the defendants' prejudice, in this, towit:

That the Court overruled the objection of the defendants to questions propounded to the government witness, I. H. Cory, relative to the contents of a certain bottle, which questions, objections, answers and exceptions are as follows:

"Q. What would you say the contents of the bottle was?

MR. WILLIAMS: I object to that as immaterial, calling for a conclusion of the witness, and no proper foundation laid.

THE COURT: Overruled.

MR. WILLIAMS: Exception.

A I would say that it is Scotch Whisky.

THE COURT: Do you know Scotch Whisky when you taste it?

A Yes, sir.

MR. WILLIAMS: We object to his statement that he knows Scotch Whisky when he tastes it, and I renew my objection that the proper foundation has not been laid.

THE COURT: Some people, I suppose, know it. This witness says he does. Overruled.

MR. WILLIAMS: Exception.

MR. Mc GANN: I ask at this time to introduce in evidence Government's Exhibit No. 2.

MR. WILLIAMS: The same objection. No proper foundation laid.

THE COURT: Overruled. In what respect is the foundation insufficient?

Mr. WILLIAMS: It has not been shown what the bottle contains. It might be gingerale, from the color of it, for all we know.

THE COURT: I know, but color is not the only thing that goes into the consideration of what it is. If he said he looked at the color and said it was Scotch Whiskey, that would be different, but he didn't do that. He said he tasted it. Overruled.

MR. WILLIAMS: Exception."

Reporter's Transcript—Page 12, Line 1, to Page 13, Line 4.)

The admission of which evidetnce over the objection of the defendants, and the Court's refusal to strike the same out, but to permit said answers to remain in the record, these defendants hereby assign, in view of the other evidence in this case, as highly prejudicial to themselves.

VI.

The trial Court erred in admitting incompetent and immaterial evidence, to the defendants' prejudice, to-wit:

That the Court permitted certain questions, and refused to strike out answers relating to a certain raid being conducted upon the premises, known as the Glendale Tavern, and to permit the government agents to testify as to what occurred at said place at said time, and as to the conclusions of certain witnesses

relative to certain acts committed at the time of said raid, all of which questions, objections, answers and exceptions are as follows:

"MR. Mc GANN: Q. Who was present at the time of the raid?

A Agent Glynn, Agent Plunkett, Whittier, Hooke and Agent Cass from San Diego, and Agent Tyson of the Los Angeles office. We went there on a search warrant which I had procured on affidavit before United States Commissioner Long, alleging these sales.

MR. WILLIAMS: I move it be stricken out as immaterial and not the best evidence.

THE COURT: Denied. It is harmless.

MR. WILLIAMS: Exception.

MR. Mc GANN: Q Then what did you do?

A We entered the place, and immediately the place was in an uproar.

MR. WILLIAMS: I move that be stricken out as a conclusion.

THE COURT: Denied. Harmless.

MR. WILLIAMS: Exception.

A (Continuing) And bottles were thrown to the floor and broken, bottles and glasses were thrown around, and one agent was assaulted, Agent Cass, I believe.

MR. WILLIAMS: I move that all of that be stricken out as calling for a conclusion of the witness.

THE COURT: Denied.

MR. WILLIAMS: Exception.

A (Continuing) During it all we succeeded in getting from the tables, or thereabouts, three bottles, two

bottles of gin and one bottle containing Scotch Whiskey, about half full. I arrested Mr. Landfield and Mr. Oliver, and this George Cook, who had given me the o.k. card from the first place, and who at that time was acting as a waiter for Mr. Landfield.

MR. WILLIAMS: I move that that answer be stricken out as immaterial and no foundation laid.

THE COURT: Denied.

MR. WILLIAMS: Exception.

A (Continuing) At that time I took Mr. Landfield and sat him down in a chair, and he got up and started to run around, and I sat him down again and told him I didn't want him to get up again or I would put the handcuffs on him, and that he had better be a little quiet. He said, "Well, I am not responsible for this stuff in my place." He said, "The guests brought it in and how am I going to keep them out?" I said, "Mr. Landfield, that is your business. If you have liquor that is in the quantity that it is in this place, and let your guests bring it in, and you don't stop them, you are responsible, and the Federal Government are going to keep your place clean."

MR. WILLIAMS: We object to all of that and move that it be stricken out as immaterial.

THE COURT: Denied.

MR. WILLIAMS: Exception."

Reporter's Transcript—Page 13, Line 26, to Page 15, Line 25."

Without laying any foundation for the admission of said testimony, and upon the objection being made by the defendants that the evidence was not the best evi-

dence, the defendants hereby assign the admission of said testimony in evidence as prejudicial error for the reason that it was so highly prejudicial in its character that, in view of all the other evidence in the case, it is shown that by its admission, the jury was led to convict the defendants by reason of passion and prejudice, and not upon the legal evidence introduced at the trial of said cause, and the objections of the defendants to such questions, and their exceptions to the ruling of the Court were duly taken and allowed.

VII.

The trial Court erred in admitting incompetent evidence and hearsay evidence, to defendants' prejudice, in this, towit:

That the Court permitted the government witness, Cory, to state what a label on a bottle showed as to the time of the raid, which questions, objections, answers and exceptions are as follows:

"A These three bottles were found in the premises at the time of the raid on the 28th day of August, it says here, (indicating).

MR. WILLIAMS: I move that "it shows here" be stricken out as hearsay.

THE COURT: Denied.

MR. WILLIAMS: Exception."

(Reporter's Transcript—Page 16, Line 2, to Page 16, Line 8.)

Without laying any foundation for the admission of said testimony, and upon the objection being made by the defendants that the evidence was not the best evidence, the defendants hereby assign the admission of

said testimony in evidence, as prejudicial error for the reason that it was so highly prejudicial in its character that, in view of all the other evidence in the case, it is shown that by its admission, the jury was led to convict the defendants by reason of passion and prejudice, and not upon the legal evidence introduced at the trial of said cause, and the objections of the defendants to such questions, and their exceptions to the ruling of the Court were duly taken and allowed.

VIII.

That the Trial Court erred in admitting incompetent evidence to defendants' prejudice, in this, towit:

That the Court overruled the objections of the defendants to the introduction into evidence of government exhibit number three, without any foundation being laid for the introduction into evidence of said government's exhibit number three.

"MR. Mc GANN: Q Now, did you examine the contents of the three bottles at that time?

A Yes, sir; I did.

Q What sort of an examination did you make, Mr. Cory?

A I sat at the table there making the return on the search warrant, and as the agents found the liquor they brought it over to me and I smelled it and tested it to make sure what it was, and then I gave Mr. Landfield a return on the search warrant for them.

Q What did you find the contents of these bottles to be?

A These two bottles, so-called "gin." This other bottle is Scotch Whisky.

MR. WILLIAMS: I move that that answer be stricken out on the ground there is no proper foundation laid and calling for a conclusion of the witness.

THE COURT: Overruled.

MR. WILLIAMS: Exception.

MR. Mc GANN: I ask at this time, if the Court pleases, that the three bottles, the two bottles of gin and the one bottle of Scotch Whisky, be accepted in evidence as Government's Exhibit No. 3.

MR. WILLIAMS: I object to their introduction as immaterial, and no proper foundation laid.

THE COURT: Are you still bothered with the color, or is it something else?

MR. WILLIAMS: The color looks quite natural. It looks like water.

THE COURT: In what respect is the foundation insufficient?

MR. WILLIAMS: This witness is not qualified.

THE COURT: You still know gin and whisky, do you?

A. Yes, sir.

Q When you taste them?

A Yes, sir.

Q And you tasted those bottles?

A. Yes, sir.

Q And it was gin and whisky?

A Yes, sir.

MR. WILLIAMS: I object to that and move that the answer be stricken out as immaterial, and object

to the introduction of the testimony, on the same ground.

THE COURT: Denied.

MR. WILLIAMS: Exception.

MR. Mc GANN: Q You testified that the waiter brought you some lemon juice.

MR. WILLIAMS: Has the Government introduced these three bottles?

MR. Mc GANN: Yes.

MR. WILLIAMS: Has your Honor ruled upon their introduction?

THE COURT: Yes.

MR. WILLIAMS: I desire an exception to that ruling."

(Reporter's Transcript—Page 16, Line 10, to Page 18, Line 10.)

Without laying any foundation for the admission of said testimony, and upon the objection being made by the defendants that the evidence was not the best evidence, the defendants hereby assign the admission of said testimony in evidence, as prejudicial error for the reason that it was so highly prejudicial in its character that, in view of all the other evidence in the case, it is shown that by its admission, the jury was led to convict the defendants by reason of passion and prejudice, and not upon the legal evidence introduced at the trial of said cause, and the objections of the defendants to such questions, and their exceptions to the ruling of the Court were duly taken and allowed.

IX.

The trial Court erred in admitting incompetent evidence to defendants' prejudice, towit:

That the Court overruled the objections of the defendants to the testimony of plaintiff's witness, Mrs. Cory, relative to the contents of a certain bottle introduced into evidence, which was objected to upon the ground that the questions and answers thereto, called for a conclusion of the witness, and that no proper foundation had been laid therefor, which questions, objections, answers and exceptions are as follows:

"A The bottle that the gin was served in was a bottle just like this, with a White Rock label on it.

MR. WILLIAMS: I move that the word "gin" be stricken out as calling for a conclusion of the witness and no proper foundation laid.

THE COURT: Denied.

MR. WILLIAMS: Exception.

MR. Mc GANN: Q Did you examine the contents of the bottle?

A Why, I sampled it, if that is what you want to know.

Q You tasted some of it, did you?

A Yes, sir.

Q How much?

A We made up a drink of gin fizz.

Q Do you know gin when you taste it?

A I think so.

Q Do you?

A Yes, sir.

Q Would you say it was gin that you drank at that time?

A I would say so; yes, sir.

Q It was taken from this bottle?

MR. WILLIAMS: I move that all of the witness's testimony as to the contents of the bottle be stricken out as calling for a conclusion of the witness, and no proper foundation laid, your Honor.

THE COURT: Denied.

MR. WILLIAMS: Exception.

(Reporter's Transcript—Page 32, Line 20 to Page 33, Line 22)

Without laying any foundation for the admission of said testimony, and upon the objection being made by the defendants that the evidence was not the best evidence, the defendants hereby assign the admission of said testimony in evidence, as prejudicial error for the reason that it was so highly prejudicial in its character that, in view of all the other evidence in the case, it is shown that by its admission, the jury was led to convict the defendants by reason of passion and prejudice, and not upon the legal evidence introduced at the trial of said cause, and the objections of the defendants to such questions, and their exceptions to the ruling of the court were duly taken and allowed.

X.

The trial Court erred in admitting incompetent evidence, to defendants' prejudice, in this, towit:

That the Court, over the objections of the defendants permitted the plaintiff's witness, Mrs. Cory, to testify as to the contents of one of the exhibits of the

plaintiff herein, introduced into evidence, which said testimony was incompetent, irrelevant and no foundation laid, which questions, answers, objections and exceptions are as follows:

"Q I will ask you ever have seen this bottle before?

A It was served in a flask, a pint flask similar to that, and I presume that is the same bottle.

MR. WILLIAMS: I didn't hear that.

A I say, it was served in a pint flask and I presume that is the same bottle.

MR. WILLIAMS: I object to what the witness presumes as incompetent, irrelevant and immaterial, and no foundation laid.

THE COURT: Q Did it look like that bottle?

A Yes, sir; it was a plain bottle just like that.

MR. Mc GANN: Q Did you drink any of the contents out of that bottle at that time?

A I took just one drink.

Q You know that it was whiskey?

A Yes, sir, it was whisky.

Q Were you there on any other occasion?

A No, sir.

Q Did you at any time see Mr. Oliver on your visits?

A I did not.

Q Did you know Mr. Landfield, when you saw him?

A Yes, sir.

Q Is he in the court room now?

A He is sitting directly in back of his attorney.

MR. Mc GANN: Take the witness."

(Reporter's Transcript—Page 34, Line 22, to Page 35, Line 20.)

The admission of which evidence upon the objection being made that the said evidence was incompetent, irrelevant and immaterial, and no foundation laid therefor, the defendants herein assign as prejudicial error.

XI.

The trial Court erred in admitting incompetent evidence, to defendants' prejudice, in this, towit:

That the Court overruled the objections of the defendants to the testimony of the government's witness, Ahlin, that he had purchased a bottle of Scotch Whisky from the defendant, Ellis, for the sum of Five Dollars, ($5.00), same being out of the presence of the defendants, Landfield and Oliver, which questions, objections, answers and exceptions are as follows:

"Mr. Mc GANN: Q Just state what the conversation was, Mr. Ahlin.

A Agent Cory spoke up and said, "This is a friend of mine from San Francisco, and anything that he asks for is all right, give it to him." Landfield answered that it would be all right with him, and with that this fellow Ellis came to the table and I was introduced to him also, and I advised him that I wanted a bottle of Scotch.

MR. WILLIAMS: We object to that unless Landfield was present during the conversation with Ellis.

THE COURT: Was he there?

A He was there.

THE COURT: Don't say anything unless it took place in the presence of one of the defendants.

A Mr. Landfield was present, and a short time after that Mr. Ellis beckoned to me to come over to the little room off of the dance floor there and delivered me a pint bottle of Scotch Whisky, for which I gave him $5.00.

Q I will ask you if you have ever seen this bottle before (handing bottle to witness)?

A I have.

Q Where?

A It was bought out there at the Glendale Tavern from Mr. Ellis.

Q Is that the bottle you bought from Mr. Ellis?

A It is.

Q Where was the defendant, Landfield, when you bought that?

A In the premises some place.

Q Was he in your immediate presence when you purchased this from Mr. Ellis?

A I was in the room by myself with Mr. Ellis.

MR. WILLIAMS: I move that all of that testimony be stricken out on behalf of the defendants Landfield and Oliver.

THE COURT: Denied."

(Reporter's Transcript—Page 50, Line 15, to Page 51, Line 10.)

The admission of which evidence upon the objection being made that said evidence was incompetent, irrelevant and immaterial and hearsay, the defendants hereby assign as prejudicial error.

XII.

The trial Court erred in admitting incompetent evidence to defendants' prejudice, in this, towit:

That the Court permitted the government's witness, Ahlin, to testify as to the contents of a certain bottle introduced in evidence over the objection of the defendants to said testimony, as calling for a conclusion of the witness, and no foundation being laid therefor.

"Q What did you ascertain the contents of that bottle to be?

A Scotch Whisky.

MR. WILLIAMS: We object to that as immaterial and no foundation laid.

THE COURT: Do you know Scotch Whisky when you taste it?

A Yes, sir.

Q Did you taste this?

A Yes, sir.

Q Was that Scotch Whisky?

A Yes, sir.

Q It was?

A Yes, sir.

MR. WILLIAMS: I move that that be stricken out as calling for the conclusion of the witness and no foundation laid.

THE COURT: Denied.

MR. WILLIAMS: Exception."

(Reporter's Transcript—Page 51, Line 14, to Page 52, Line 6.)

The admission of which evidence upon the objection of the defendants that said evidence was incompetent,

irrelevant and immaterial, calling for the conclusion of the witness, and no foundation laid, these defendants assign as error.

XIII.

The trial Court erred in admitting incompetent and immaterial evidence, to defendants' prejudice, in this, towit:

That the Court, over the objection of the defendants permitted the government's witness, Ahlin, to testify that the defendant Oliver, had sold liquor to said witness, Ahlin, in the month of October, 1924, which said evidence was objected to upon the grounds that it was immaterial and not within any of the times charged in the Information, and was at a time, subsequent in point of time, to the offenses charged in said Information, which questions, exceptions and answers and objections are as follows:

"MR. Mc GANN: Q Were you at that address at any other time?

A I was out there at a later date.

Q What date?

A Around in October some time.

Q What was the occasion of your visit?

MR. WILLIAMS: We object to any October visit on the ground that it is immaterial, and not within the time charged in this information.

THE COURT: Denied.

MR. WILLIAMS: The last date mentioned was October.

THE COURT: They are charged with maintaining a nuisance on or about the 29th day of August, and

any time either before or after that, within a reasonable degree, would be relevant.

MR. WILLIAMS: We renew our objection to the October visit on the ground that it is too far removed, too remote, and incompetent.

THE COURT: Overruled.

MR. WILLIAMS: Exception

MR. McGANN: Q What was the purpose of your visit?

A With Agent Bybee we visited these premises again and we then purchased liquor. This liquor was purchased by me of Oliver in the presence of Mickey Murphy, who was the main proprietor of the place at that time.

MR. WILLIAMS: I move that that all be stricken out as immaterial to the issues contained in this indictment.

THE COURT: Denied.

MR. WILLIAMS: Exception."

(Reporter's Transcript—Page 52, Line 7, to Page 53, Line 9).

The admission of which evidence, upon the objection being made by the defendants that the same was immaterial, too far removed, remote and incompetent, the defendants hereby assign as prejudicial error for the reason that it was so highly prejudicial in its character that in view of all the other evidence in the case, it is shown that by its admission, the jury was led to convict the defendants by reason of passion and prejudice and not upon the legal evidence introduced at the trial of the said cause, and the objections of the

defendants to such questions, and their exceptions to the ruling of the Court were duly taken and allowed.

XIV.

The trial Court erred in refusing to direct a verdict of "Not Guilty" as to the defendant, J. W. Oliver, upon each of the five counts contained in said Information, upon the close of the government's evidence and case in that the allegations contained in the five counts of the Information had not been proven as against the defendant, Oliver, and that there was not sufficient legal evidence produced by the plaintiff herein against said defendant to show that any of the offenses included in the five counts contained in the Information, charged against him, had been committed by said defendant, Oliver, which Motion and exception of defendant is as follows:

"MR. WILLIAMS: At this time, in compliance with the practice of this Court, I desire at this time to move, on behalf of the defendant J. W. Oliver, as to Count 1 of this information, that the Jury be instructed to acquit the defendant, J. W. Oliver, on the ground—

THE COURT: The motion will be denied, and it may be considered as having been made on behalf of each of the defendants as to each count of the indictment, and denied.

MR. WILLIAMS: I would like to make my motion, if the Court please.

THE COURT: I said it might be considered as made to all defendants on all counts, and denied.

MR. WILLIAMS: I desire to move also as to Count 2—

THE COURT: I said it might be considered as having been made with respect to each defendant and as to each count, and denied.

MR. WILLIAMS: That includes counts 3, count 4 and count 5?

THE COURT: Yes, and denied. Proceed.

MR. WILLIAMS: Now, on behalf of the defendant, Herman Landfield, I desire to move this Court that the Jury be instructed—

THE COURT: It has been suggested, Mr. Williams, that—

MR. WILLIAMS: Wait a minute, if the Court please; I haven't made my motion.

THE COURT: I said it might be considered as to each defendant and each count, and the motion denied.

MR. WILLIAMS: I should like the Court to know there are five counts.

THE COURT: I know there are five counts, and it may be considered as made to five counts by each defendant, and denied.

MR. WILLIAMS: For the purpose of the record—

THE COURT: So now that ought to be understood, proceed.

MR. WILLIAMS: Very well, Mr. Landfield, take the stand, please."

(Reporter's Transcript—Page 60, Line 6, to Page 61, Line 15.)

The denial of which motion, the defendant, Oliver, hereby assigns as prejudicial error in view of the evi-

dence produced prior to the said motions upon the part of the United States.

XV.

The trial Court erred in refusing to direct a verdict of "Not Guilty" as to the defendant, Herman Landfield, upon each of the five counts contained in said Information, upon the close of the governments' evidence and case, in that the allegations contained in the five counts of the Information had not been proven as against the defendant, Landfield, and that there was not sufficient legal evidence produced by the plaintiff herein against said defendant to show that any of the offenses included in the five counts contained in the Information, charged against him, had been committed by said defendant, Landfield, which Motion and exception of defendant is as follows:

(Reporter's Transcript—same as in preceding specification or Error.)

XVI.

The trial Court erred in that the Court interrogated the defendant, Landfield, and directed certain questions to said defendant, Landfield, over the objection of the said defendants, which said questions were improper and *arumentative,* called for a conclusion of the witness and were prejudicial to the defendants in that the Court, by said questions, placed the said Landfield in such a position that to answer the said questions, the said Landfield was compelled to accuse the government agents of having committed a deliberate falsehood, which questions, answers, objections and exceptions are as follows:

"Q All of these statements of these witnesses have made that they bought liquor there at your place from you or through you is all false?

A Absolutely, your Honor.

Q They have just come here and told a deliberate falshood?

MR. WILLIAMS: We will have to object to that question, Your Honor, on the ground that it is argumentative.

THE COURT: Overruled.

MR. WILLIAMS: Exception.

THE COURT: Q That is a fact, is it not?

A Yes, sir."

(Reporter's Transcript—Page 72, Line 15, to Page 72, Line 26.)

The asking of which questions, and upon the objections being made that the same was argumentative, the defendants hereby assign as prejudicial error.

XVII.

The trial Court erred in refusing to direct a verdict of "Not Guilty" upon each count of the Indictment as to the defendant, Herman Landfield, and as to the defendant, J. W. Oliver, at the close of all the evidence, in this, towit:

That the five counts contained in the Information as against each defendant, had not been proven against these defendants, and that no evidence had been introduced as against the defendant, Landfield or as against the defendant, Oliver, upon each or any of the counts contained in the Information to prove the

commission of said offenses contained in each of said counts.

"MR. WILLIAMS: The defendants rest, with this exception: I desire at this time to renew my motions.

THE COURT: Denied.

MR. WILLIAMS: Just a moment. I haven't made my motions.

THE COURT: It may be considered as having been made and denied.

MR. WILLIAMS: For the purpose of the record I desire to make the motion on behalf of the Defendants Landfield and Oliver.

THE COURT: It may be considered as having been made to each defendant on each count, the motion to dismiss on each count, and it is denied. Proceed.

MR. WILLIAMS: I desire to make my motion, if the Court pleases.

THE COURT: It may be regarded as having been made to each count and as to each defendant, and denied.

MR. WILLIAMS: Exception. On Count 3 there is no testimony to substantiate that count, and I move that that be dismissed.

THE COURT: Denied.

MR. WILLIAMS: I don't want to have any argument.

THE COURT: Any Rebuttal?

MR. Mc GANN: No rebuttal.

THE COURT: How much time do you want for argument?

MR. Mc GANN: It will only take a few moments for argument.

MR. WILLIAMS: I would suggest, your Honor, that I can present this matter in 30 minutes.

THE COURT: Oh, 15 minutes will be ample.

MR. WILLIAMS: I at this time request that I should be given 30 minutes.

THE COURT: Denied.

MR. WILLIAMS: Exception.

(Reporter's Transcript—Page 75, Line 3, to Page 76, Line 10.)

The denials of which motions, the defendants herein assign as prejudicial error in view of the evidence produced prior to said motions upon the part of both the United States and the defendants, Landfield and Oliver.

XVIII.

The trial Court erred in the charge to the Jury, to the defendants' prejudice, in this, towit:

That the trial Court gave the following instruction to the Jury, to the giving of which instruction, the exception of the defendants was duly taken and allowed, which instruction is erroneous as a statement of the law upon the ground that the Jury was instructed that the testimony of the defendant, Landfield, was to be adjudged not in accordance with the same rules given in respect to other witnesses, which instruction is as follows:

"Now, in this case the defendant Landfield has offered himself as a witness in this case. That is his

right, and you are to hear his testimony in accordance with the same rules I have given you with respect to other witnesses in the case, but with this additional effect, which is personal to him: That you are to hear his testimony in the light of the fact that he is a defendant in the case and in the light of the fact of his interest in the outcome of the case, but you are not entitled to disregard the testimony of a witness because such witness is a defendant. There would be no justice in that. But you are to hear the testimony of the defendant in the light of the fact that he is a defendant and is interested in the case in consequence of that fact."

(Reporter's Transcript—Page 81, Line 14, to Page 82, Line 1.)

"MR. WILLIAMS: On behalf of the defendants, I desire to note an exception to your Honor's charge, and the whole thereof, and in particular to the charge as to the Court's duty in commenting on the evidence; also I desire to note an exception to your Honor's charge as to the impeachment of witnesses; I also desire to note an exception to your Honor's charge on the interest of the defendant, Landfield. I also desire to note an exception to your Honor's charge and comment on principal and accessory, aider and abetter. I also desire to note an exception as to the defendant, Oliver. I also desire to note an exception to the instruction and comment on the possession of the liquor. I also desire to note an exception to the comment and instruction as to the alcoholic content of the alleged liquor. I also desire to note an exception to the com-

ment and instruction as to the testimony of the Government officers. I also desire on behalf of the defendants to note an exception to the failure of the Court to give the instructions requested by the defendants."

(Reporter's Transcript—Page 93, Line 26, to Page 94, Line 18.)

XIX.

That the trial Court erred in the charge to the Jury to the defendants' prejudice, to-wit:

That the trial Court gave the following instruction to the Jury, to the giving of which instruction, the exceptions of the defendants were duly taken and allowed, which instruction is contrary to law in that the Jury were instructed that if they had abiding conviction and belief that the defendants were guilty, it was their duty to convict, without stating that the conviction and belief would have to be to a moral certainty, which instruction is as follows:

"When, however, weighing all of the evidence, you have an abiding conviction and belief that the defendant is guilty, it is your duty to convict, and no sympathy, sympathy for him or for his family, if he have one, or for his plight, or anything of that sort, justifies you in seeking for doubts by any strained or unreasonable construction or interpretation of the law or evidence or facts."

(Reporter's Transcript—Page 86, Line 3, to Page 86, Line 10.)

(Exception taken same as in Assignment XVIII.

XX.

The trial Court erred in the charge to the jury, to the defendants' prejudice, in this, towit:

That the trial Court gave the following instruction, to the giving of which instruction, the exception of the defendants was duly taken and allowed, which instruction is not a correct statement of the law, and which instruction reads as follows:

"Now, it is also the law, gentlemen, relevant to the matters to be submitted to you, that whoever directly commits any act constituting an offense defined in any law of the United States, or aids, abets, counsels, induces, or procures its commission, is a principal and is to be prosecuted and punished just exactly as the principal is. That means that while it may be true that one man himself does the thing which the law denominates may not be done: one man sells the liquor, one man goes and gets the liquor, or one man does something else to bring about the transaction which is forbidden by the law, and another man aids, abets, counsels, commands induces or procures the commission of the crime and knowingly helps to contribute to its success, then he is just as guilty as the other man, because it cannot be said that one man handles the money and the other gets the liquor and that he can, for that reason, be the only one that is guilty. As I have indicated to you, whoever aids, abets, commands, induces or procures the doing of that thing is just as responsible and is just as much subject to prosecution and punishment as the one who commits the offense."

(Reporter's Transcript—Page 86, Line 11, to Page 87, Line 6.)

(Exception taken same as in Assignment XVIII.)

XXI.

That the trial Court erred in the charge to the Jury to the defendants' prejudice, in this, towit:

That the trial Court gave the following instruction to the giving of which instruction the exceptions of the defendants were duly taken and allowed, which instruction is erroneous in law in these particulars:

1st. That the Court instructed the Jury that there was evidence in the case as to all the counts, with the exception of the third count.

2nd. That the Jury was instructed that the defendant, Landfield, was apparently in charge in some capacity aiding, abetting and co-operating and making it possible for the liquor to be purchased.

3rd. That the Jury was instructed that some of the witnesses had testified that the defendant, Oliver, co-operated and collaborated and knew what was going on, and contributed to it, all of which there was no testimony, or concerning which no evidence had been introduced,

Which instruction was excepted to, and is as follows:

"Now, so much, gentlemen, as to the law involved in the case, just a word or two as to the facts: These defendants are charged in three counts with having sold liquor, and one count with having possession of liquor, and in the remaining count of having maintained a nuisance. Now, it is true as to the third count, as I remember the evidence, there is not any

evidence of a sale of liquor under and pursuant to the terms of that count, so, as to that count, I think it is your plain duty to return a verdict of not guilty. There is no evidence as to the matters charged in that count. Now, there is evidence in the case—the weight or the sufficiency of which it is for you, of *cour*—as to the other remaining counts, and it is your duty to determine the guilt or innocence of the defendants in respect to them also. Now, if you believe the testimony of the Government agents who went out to this place, as they say, and, as they say, made purchases of liquor there at that place, and that the defendant Landfield, who was apparently in charge in some capacity, aiding, abetting and cooperating and making it possible for the liquor to be purchased, if you believe that, and believe it beyond a reasonable doubt, that it is a fact, why, of course, he is just as responsible as if he himself had produced the liquor and sold the liquor and taken the money, carried the liquor and did everything about it; and if the defendant Oliver, as testified by some of the witnesses, cooperated, *colaborated* with that and knew what was going on, and contributed to it, aided and abetted in so far as he did, why, he would be guilty, of course, of the thing with respect to which he did cooperate and *colaborate*, remembering, of course, that the guilt of a person has to be determined by what that person does and not by what some other person does or says."

(Reporter's Transcript—Page 88, Line 14, to Page 89, Line 20.)

(Exception same as in Assignment 18.)

XXII.

That the trial Court erred in the charge to the Jury to the defendants' prejudice, in this, towit:

That the trial Court gave the following instruction to the Jury, which said instruction is not a correct statement of the law of possession of intoxicating liquors, in this, that the Jury were instructed that if possession of liquor was in the custody and control of persons other than these defendants, at the defendants' said place of business, with knowledge thereof by the defendants, that the defendants could be found guilty of the possession thereof, to the giving of which instruction the exception of the defendants was duly taken and allowed, which instruction is as follows:

"Then with respect to the counts charging possession: There is testimony that the officers went out there on this night of the so-called raid, and they found these three quarts of liquor. If, under all of the circumstances of the case, you believe that liquor was being sold there by these defendants, as testified to by the officers who went there on this occasion, and if you believe from all the circumstances presented in the evidence that the people who had liquor there were people who had bought liquor, as the officers have testified, they bought it previously, and the defendants knew that, then, of course, they would be responsible for the liquor on the premises and should be found guilty as charged, if you believe that beyond a reasonable doubt. By the same token, if you believe that these defendants, either or both of them, cooperating together or acting independently were maintain-

ing that place out there as it has been admitted by somebody in the evidence, that it was a high class restaurant, if you believe it was maintained and the persons maintaining it, either in the position of waiter or manager or otherwise, were maintaining it as a place where liquor could be kept and sold, of course, it would be maintained and kept in violation of law and the maintaining of the place would be a common nuisance and you should find the persons maintaining that place guilty as charged, if you believe that was the fact beyond a reasonable doubt."

(Reporter's Transcript—Page 89, Line 21, to Page 90, Line 20.)

(Exception same as in Assignment XVIII.)

XXIII.

That the trial Court erred in the charge to the Jury, to the defendants' prejudice in this, towit:

That the trial Court gave the following instruction to the Jury, which the defendants contend is erroneous for two reasons:

First: That the Jury was instructed as a matter of law that the evidence introduced in behalf of the government contained more than one-half of one per cent of alcohol, although without any proof thereof having been produced by the government.

Second: That the said instruction was erroneous in that the Jury was told by said instruction that it was incumbent upon them to find the defendants guilty, or else to find that the officers of the government had deliberately perjured themselves, to the giving of which

instruction the exception of the defendants was duly given and allowed, which instruction is as follows:

"There has been some slight suggestion—I say slight suggestion, it was rather lengthily elaborated upon, to the effect that you don't know whether the stuff in these bottles contains more than one-half of one per cent of alcohol by volume. I think it hardly worth the time of the Court to elaborate upon that. It could easily be true that somebody might have difficulty in saying what near beer or beer or some other similar substance might or might not contain one-half of one per cent or more of alcohol, or thereabouts, but it would hardly seem that anybody with any experience at all, anybody that was not born day before yesterday, could not tell what gin and whisky is. That is what the testimony is, that gin and whisky was purchased. So, gentlemen, don't let your minds be diverted by any unsubstantial, specious argument like that. It is for you to say what the facts are, what the proof is, and you cannot convict the defendants if you do not believe they sold these things containing more than one-half of one percent of alcohol. If they did sell it, it would be hardly reasonable to conclude that they were selling something that contained less than one-half of one percent of alcohol; it would hardly be reasonable to believe that an article of that kind was sold for $5.00 and $7.00 a bottle, if you find it was sold for that, so the whole thing, after you simmer it down, depends upon whether you believe these officers or agents or the defendants. The defendant Landfield says that the officers—the testimony

given by the officers was an out and out falsehood, plain perjury. That is the case if his story is to be accepted that he didn't know of the sales being made and didn't participate in the sales. Then these officers have come here and deliberately perjured themselves, because there cannot be any question under the circumstances but that they went there on these occasions and that they there met and talked with the defendant. No doubt about that. It is hardly a case of mistaken identity or mistaken location. So it is just a question of what you are going to conclude. Are you going to conclude that these officers have come here and deliberately perjured themselves, or are you going to conclude that the defendant, for the purpose of removing the consequences of his own wrong doing, if he did do wrong, has testified falsely in order to escape the consequences. Both of them cannot be telling the truth. You have to determine one way or the other as to where the truth lies. You have to come to a conclusion that will be fair under all of the circumstance, free from passion, free from prejudice, giving the thing the calm, deliberate, careful and close consideration that it requires at your hands, and that it is your duty to give it, remembering that if you have a reasonable doubt of the guilt of the defendants, of course you should acquit them, but if you believe beyond a reasonable doubt that they have conducted themselves as alleged, either of them, it is your plain duty to convict them. Any exceptions to the charge?"

(Reporter's Transcript—Page 91, Line 22, to Page 93, Line 25.)

XXIV.

The Court erred in refusing to give to the Jury the following instructions requested by the defendants, to which refusal, the defendants objected and excepted.

"The law presumes each defendant to be of good character, and it is your duty to do likewise, and you must not draw any presumption against these defendants that you would not against any other persons of good character charged with a like offense.

DEFENDANTS' INSTRUCTION NO. 2.

Judge."

"The fact that the defendants, Landfield or Oliver, were friendly, or even intimately friendly with the defendant, Ellis, is not a circumstance in itself to be considered against them, neither is it sufficient to show that these defendants were involved with the said Ellis in the commission of said offense, if any was committed, but the prosecution must connect the defendants, Landfield and Oliver in some way with the commission of the alleged offense and no presumption is to be indulged in against them because the evidence may point to the guilt of the co-defendant, Ellis.

DEFENDANTS' INSTRUCTION NO. 3.

Judge."

"For one person to abet another person in the commission of a criminal offense, means for him to knowingly and with criminal intent, aid, promote, encour-

age or instigate, by act or counsel, or both by act and counsel, the commission of such criminal offense.

DEFENDANTS' INSTRUCTION NO. 15.

Judge."

"Each defendant herein is charged under one Count of this Information with knowingly, wilfully, and unlawfully maintaining a building and place where intoxicating liquors, for *berage* purposes, were kept, sold, and bartered in violation of law, and you are instructed that it is incumbent upon the government to prove that the liquors were so kept by the defendants in said building, charged in the information, for the purposes charged therein, and it is not sufficient for the government to show that certain intoxicants were found in the said building in the possession of others, but they must go further and show that the defendants had said intoxicants, if any, in their possession or control, or that they were there with the knowledge of defendants or either of them.

DEFENDANTS' INSTRUCTION NO. 18

Judge."

(Exception taken same as in Assignment XVIII Reporter's Transcript—Page 93 Line 26 to Page 94, line 18)

XXV.

The Court erred in rendering its Judgment in this case against the defendants for the reason that the evidence introduced against the defendants in this case

was not sufficient to justify the verdict of the Jury therein or the Judgment of the Court against the defendants.

XXVI.

The Court erred in rendering its Judgment in this cause against the defendants for the reason that the testimony did not show, or tend to show, that either of the defendants herein had committed any offenses or offenses set out in the Information.

XXVII.

The Court erred in rendering its Judgment in this cause against these defendants for the reason that the testimony introduced at the trial of said cause did not tend to connect the defendant, Oliver, with the commission of any offenses in any or all the counts set forth in the Information.

XXVIII.

That the Court erred as a matter of law in denying the defendants' motion for a New Trial, upon the grounds that the evidence introduced in said cause did not tend to show the commission of the offenses set forth in the Information against either of the defendants, Landfield or Oliver, to which ruling the exception of the said defendants was duly taken and allowed.

DATED: This 4th day of March, 1925.

Warren L. Williams
Seymour S Silverton
Attorneys for Defendants, Landfield and Oliver.

And upon the foregoing Assignment of Errors, and upon the record in said cause, defendants pray that the Verdict and Judgment rendered therein may be reversed.

DATED: This 4th day of March, 1925.

Warren L Williams
Seymour S Silverton

Attorneys for Defendants, Landfield and Oliver.

We hereby certify that the foregoing Assignment of Errors are made in behalf of the petitioners, Herman Landfield and J. W. Oliver, for a Writ of Error, and are, in our opinion, and the same now constitute the Assignment of Errors upon the Writ prayed for.

Warren L. Williams
Seymour S Silverton

Attorneys for Defendants, Landfield and Oliver.

[ENDORSED]: ORIGINAL. No 6793-B Criminal IN THE DISTRICT COURT OF THE UNITED STATES, IN AND FOR THE SOUTHERN DISTRICT OF CALIFORNIA SOUTHERN DIVISION. THE UNITED STATES OF AMERICA Plaintiff -vs- HERMAN LANDFIELD, J. W. OLIVER and JOHN DOE ELLIS, Defendants. ASSIGNMENT OF ERRORS ON BEHALF OF LANDFIELD and OLIVER, DEFENDANTS HEREIN. Received copy of the within Assignment of Errors, this 5th day of March, 1925. S. W. McNabb U. S. attorney By Eugene T. McGann Spec. Asst U. S. Atty. Attorney for Pltf FILED MAR 6 1925 CHAS. N. WILLIAMS, Clerk G F Gibson Deputy WARREN L. WILLIAMS S. S. SILVERTON 419 Ferguson Bldg. 307 So. Hill Street Los Angeles, Cal. Bdwy. 7881 Bdwy. 7880 Attorneys for Defendants, Landfield and Oliver

IN THE DISTRICT COURT OF THE UNITED STATES, IN AND FOR THE SOUTHERN DISTRICT OF CALIFORNIA, SOUTHERN DIVISION

THE UNITED STATES OF AMERICA, Plaintiff, -vs- HERMAN LANDFIELD, J. W. OLIVER and JOHN DOE ELLIS, Defendants.	No. 6793-B Crim. PETITION FOR A WRIT OF ERROR.

Your petitioners, HERMAN LANDFIELD and J. W. OLIVER, defendants in the above entitled cause, bring this, their Petition and the Petition of each of them, for a Writ of Error to the District Court of the United States, in and for the Southern District of California; and in that behalf your petitioner, Herman Landfield says, That on the 25th day of February 1925, there was made, given and rendered in the above entitled Court and cause, a Judgment against your petitioner, Herman Landfield, whereby your petitioner was adjudged and sentenced upon the first Count in the Information in the above entitled cause, to serve a term of six (6) months in the Orange County Jail, in the County of Orange, State of California, to serve a term of six (6) months in the Orange County Jail, in the County of Orange, State of California upon the second Count in the said Information in the above entitled action, and to pay a fine of One Dollar, ($1.00) upon the fourth Count in said

Information in the above entitled cause contained, and upon the fifth Count of said Information filed in the above entitled cause, your petitioner herein, Herman Landfield, was sentenced to serve a term of one (1) year in the Orange County Jail, Orange County, California, and to pay a fine of One Thousand Dollars, ($1,000.00), said petitioner to be committed until the payment of said fines, the said Judgment against your petitioner herein upon the first, second and fifth Counts, as far as the same relate to imprisonment, to be served concurrently; and that at said time and place aforesaid, there was made, given and rendered in the above entitled Court and cause, a Judgment against the petitioner, J. W. Oliver, whereby said petitioner was adjudged and sentenced upon the fourth Count of said Information in the above entitled cause, to pay a fine of One Dollar, ($1.00) and to be committed until said fine was paid, and upon the fifth Count in said Information contained, to be confined in the Orange County Jail, in the County of Orange, State of California, and to serve a term therein of six (6) months, and each of your petitioners say that he is advised by his counsel, and avers that there was and is manifest error in the records and proceedings had in said cause, and in the making, giving and entering of said Judgment and Sentence aforesaid against each of your petitioners herein, to the great injury and damage of your petitioners and each of them, and each and all of these errors will be more fully made to appear by an examination of said records and by an examination of the Bill of Exceptions to be here-

after by your petitioners, tendered and filed, and the Assignment of Errors which is filed with his Petition, and to that end, that sentence and proceedings may be reviewed by the United States Circuit Court of Appeals, for the Ninth Circuit, and your petitioners pray that a Writ of Error may be issued directed therefrom to the said District Court of the United States for the Southern District of California, Southern Division, returnable according to law and the practice of the Court, and that there may be directed to be returned, pursuant thereto, a true copy of the record, Bill of Exceptions, Assignment of Errors, and all proceedings had and to be had in said cause, and that the same may be removed unto the United States Circuit Court of Appeals for the Ninth Circuit, to the end that the error, if any has happened, may be duly corrected, and full and speedy justice done your petitioners.

And your petitioners make the Assignment of Errors filed herewith, upon which they will rely, and will be made to appear by a return of the said record in obedience to said Writ.

WHEREFORE, your petitioner prays the issuance of a Writ as herein prayed, and that the Assignment of Errors filed herewith may be considered as their assignment upon the Writ, and that the Judgment rendered in this cause may be reversed and held for naught, as to each of the petitioners herein, and that said cause be remanded for further proceedings, and

that each of these petitioners be awarded a Supersedeas upon said Judgment, and all necessary process including bail.

Herman Landfield
J W Oliver
Petitioners.

Warren L. Williams
Seymour S Silverton
Attorneys for Defendant.

[ENDORSED]: ORIGINAL No. 6793-B Crim. IN THE DISTRICT COURT OF THE UNITED STATES, IN AND FOR THE SOUTHERN DISTRICT OF CALIFORNIA, SOUTHERN DIVISION. THE UNITED STATES OF AMERICA, Plaintiff -vs- HERMAN LANDFIELD, J. W. OLIVER and JOHN DOE ELLIS, Defendants. PETITION FOR A WRIT OF ERROR Rec'd copy of the within Petition for a Writ of Error this 5th day of March, 1925 S. W. McNabb U. S. Atty By Eugene T. McGann Spec. Asst U. S. Atty Attorney for Pltf. FILED MAR 6 1925 CHAS. N. WILLIAMS Clerk G F Gibson Deputy. WARREN L. WILLIAMS S. S. SILVERTON 419 Ferguson Bldg. 307 So. Hill Street LOS ANGELES, CAL. Bdwy. 7881 Bdwy. 7880 Attorneys for Defendants, Landfield and Oliver

IN THE DISTRICT COURT OF THE UNITED STATES, IN AND FOR THE SOUTHERN DISTRICT OF CALIFORNIA, SOUTHERN DIVISION.

THE UNITED STATES OF AMERICA, Plaintiff, -vs- HERMAN LANDFIELD, J. W. OLIVER and JOHN DOE ELLIS, Defendants.	No. 6793-B Crim. ORDER ALLOWING WRIT OF ERROR.

Upon Motion of WARREN L. WILLIAMS and SEYMOUR S. SILVERTON, ESQS., Attorneys for the defendants, HERMAN LANDFIELD and J. W. OLIVER, and upon filing the Petition for a Writ of Error and Assignment of Errors herein, it is

ORDERED, that a Writ of Error be, and hereby is, allowed to have reviewed in the United States Circuit Court of Appeals for the Ninth Circuit, the verdict and judgment heretofore made and entered herein; that pending the decision upon said Writ of Error, the Supersedeas prayed for by the defendant, in his petition for a Writ of Error herein, is hereby allowed; the defendant, Herman Landfield is admitted to bail upon said Writ of Error in the sum of $10,000.00 and the defendant, J. W. Oliver, is admitted to bail upon said Writ of Error in the sum of $5,000.00.

DATED: This 5 day of March, 1925, at Los Angeles, California.

Bledsoe

Judge of the United States District Court.

[ENDORSED]: ORIGINAL No. 6793-B Crim IN THE DISTRICT COURT OF THE U. S. IN AND FOR THE SOUTHERN DISTRICT OF CALIFORNIA SOUTHERN DIVISION THE U. S. OF AMERICA Plaintiff vs. HERMAN LANDFIELD, J. W. OLIVER Defendant ORDER ALLOWING WRIT OF ERROR. FILED MAR 6 1925 CHAS N WILLIAMS, Clerk G. F. Gibson Deputy. WARREN L. WILLIAMS SEYMOUR S. SILVERTON 419 Ferguson Building 307 So. Hill Street LOS ANGELES, CAL. Bdwy. 7881 Attorneys for Defendants, Landfield and Oliver

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IN THE DISTRICT COURT OF THE UNITED STATES, IN AND FOR THE SOUTHERN DISTRICT OF CALIFORNIA, SOUTHERN DIVISION.

THE UNITED STATES OF AMERICA, Plaintiff	)	
-vs-	)	No. 6793-B Crim.
HERMAN LANDFIELD, J. W. OLIVER and JOHN DOE ELLIS, Defendants.	)	SUPERSEDEAS ORDER.

The defendants herein having heretofore petitioned the above entitled Court for a Writ of Error, to have reviewed in the United States Circuit Court of Appeals for the Ninth Circuit, the verdict and judgment

heretofore made and entered herein, and the above entitled Court upon the 5th day of March, 1925, having allowed the said Writ and fixed bail of the defendant herein, Herman Landfield, upon said Writ at the sum of $10,000.00, and the defendant, J. W. Oliver, upon said Writ of Error at the sum of $5000.00, and said Writ having been filed on the 6th day of March, 1925.

IT IS ORDERED, that the same shall operate as a Supersedeas, and the Clerk is hereby directed to stay the Mandate of the District Court of the Southern District of California, Southern Division, and that no further proceedings shall be had in this cause in this Court until the final determination thereof in the said United States Circuit Court of Appeals upon the filing and approval by the Court of a bond in the penal sum of $10,000.00 with surety thereon for defendant, Herman Landfield and a Bond in the penal sum of $5000.00 with surety *theren* for defendant J. W. Oliver.

Bledsoe

Judge of the United States District Court, Southern District of California, Southern Division.

[ENDORSED]: ORIGINAL No. 6793-B Crim. IN THE DISTRICT COURT OF THE U. S. IN AND FOR THE SOUTHERN DISTRICT OF CALIFORNIA SOUTHERN DIVISION THE UNITED STATES OF AMERICA Plaintiff vs. HERMAN LANDFIELD, J. W. OLIVER and JOHN DOE ELLIS Defendant SUPERSEDEAS ORDER.

FILED MAR 6 1925 CHAS. N. WILLIAMS, Clerk G. F. Gibson, Deputy WARREN L. WILLIAMS SEYMOUR S. SILVERTON 419 Ferguson Building 307 So. Hill Street LOS ANGELES, CAL. Bdwy. 7881 Attorneys for Defendants Landfield and Oliver

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IN THE DISTRICT COURT OF THE UNITED STATES, IN AND FOR THE SOUTHERN DISTRICT OF CALIFORNIA, SOUTHERN DIVISION.

THE UNITED STATES OF AMERICA, Plaintiff,	)	
vs.	)	#6793 B
HERMAN LANDFIELD, J. W. OLIVER, JOHN DOE ELLIS, Defendants.	)	BOND PENDING DECISION UPON WRIT OF ERROR.

KNOW ALL MEN BY THESE PRESENTS, that we, Herman Landfield, of the County of Los Angeles, State of California, as principal, and Pearl Johnson and Berenice Jones, as sureties, are jointly and severally held and formally bound to the United States of America, to the full and just sum of Ten Thousand Two Hundred Fifty Dollars ($10,250.00) to be paid to the said United States of America, to which payment, well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 16th day of March, 1925 .

Herman Landfield
Pearl Johnson
Berenice Jones

WHEREAS lately, at a Term of the District Court of the United States, Southern District of California, Southern Division, in a suit pending in said Court, between the United States of America, plaintiff and Herman Landfield, defendant, a judgment and sentence were made, given and rendered against said Herman Landfield, and the said Herman Landfield, having obtained a Writ of Error from the United States Circuit Court of Appeals for the Ninth Circuit, to reverse the judgment and sentence in the aforesaid suit, and a Citation directed to the said United States of America to be and appear in the United States of America, citing and admonishing the United States of America to be and appear in the United States Circuit Court of Appeals for the Ninth Circuit, at the city of San Francisco, California, pursuant to the terms and at the time fixed, in the said citation, which said citation has been duly served and filed, and

WHEREAS, the said Herman Landfield has been admitted to bail, pending decision upon said Writ of error in the sum of Ten Thousand two hundred fifty dollars ($10,250.00) and the said sureties on this Bond agree and promise that the said Herman Landfield will pay all costs which may be awarded against him on said Writ of Error or on a dismissal thereof, not exceeding the amount of Two Hundred fifty

($250.00) dollars, to which amount we acknowledge ourselves jointly and severally bound,

NOW THEREFORE, the condition of the above obligation is such that if the said Herman Landfield, shall appear, either in person or by his attorney in the United States Circuit Court of Appeals for the Ninth Circuit, on such day or days, as may be appointed for the hearing of said cause in said Court, and prosecute his Writ of Error, and if the said Herman Landfield, shall abide by and obey all orders made by the United Circuit Court of Appeals for the Ninth Circuit; and if the said Herman Landfield, shall appear for trial in the District Court of the United States for the Southern District of California, Southern Division, on such day or days, as may be *appointe* for the re-trial by said District Court, if the judgment and sentence against him be reversed by the United States Circuit Court of Appeals for the Ninth Circuit, and if the said Herman Landfield, shall surr3nder himself in execution of the judgment and sentence aforesaid, if the said judgment and sentence against him be affirmed by the said Circuit Court of Appeals for the Ninth Circuit, then the above obligation to be void, upon payment by said Herman Landfield of all or any costs adjudged against him; otherwise, to remain in full force, virtue and effect.

Herman Landfield
972 W. 43rd Place
Principal.
Pearl Johnson
Surety
Berenice Jones
Surety

Signed, sealed and acknowledged this 16th day of March, 1925.

UNITED STATES OF AMERICA,)
STATE OF CALIFORNIA, ss
COUNTY OF LOS ANGELES)

Pearl Johnson and Berenice Jones sureties in the within undertaking, being duly sworn, say, each for himself and not one for the other that he is worth the sum specified in the said Undertaking over and above all his just debts and liabilities (exclusive of property exempt from execution) and that he is a resident of the State of California and freeholder therein.

Pearl Johnson
Berenice Jones

Subscribed and sworn to before me this 16th day of March, 1925

Raymond I. Turney (Seal)
United States Commissioner.

I hereby approve the form of the within bond and the sufficiency of the sureties thereon.

Raymond I. Turney (Seal)
United States Commissioner
March 16, 1925.

I have examined the Sureties to the within Bond and said Bond is hereby approved and allowed in the amount therein.

A. (1) Lot 62 on the Pardee tract per maps recorded in Book 5—page 23 of maps in office of the County Recorder of said County.

(2) Lot 42 of Shorb and Compton Ave. Blvd. tract —Recorded in Book 8, Page 125 of Maps of Los Angeles, State of California.

(3) Lot 42-43-44-45- of Elcoat tract. County of Los Angeles, State of California. Value $12,000 clear.

B. (1) South east ¼ - N. E. ¼ Section 10 lots 2 and 3 S. W. ¼ - of N. E. ¼ - S. E. ¼ of N. W. ¼ - N. E. ¼ of S. W. ½ - of the W. ½ W. ½ of the N. W. ¼ of Sec. 11 - Township 10 North - Range 28 West - San *Barnadino* Meridian. Value $60,000, clear.

[ENDORSED]: ORIGINAL IN THE DISTRICT COURT OF THE UNITED STATES IN AND FOR THE SOUTHERN DISTRICT OF CALIFORNIA SOUTHERN DIVISION THE UNITED STATES OF AMERICA Plaintiff, vs. HERMAN LANDFIELD, J. W. OLIVER, JOHN DOE ELLIS, DEFENDANTS. BOND OF DEFENDANT, LANDFIELD PENDING DECISION UPON WRIT OF ERROR. Approved Bledsoe U. S. District Judge FILED MAR 16 1925 CHAS. N. WILLIAMS, Clerk G. F. Gibson Deputy

IN THE DISTRICT COURT OF THE UNITED STATES, IN AND FOR THE SOUTHERN DISTRICT OF CALIFORNIA, SOUTHERN DIVISION.

THE UNITED STATES OF AMERICA, Plaintiff,	)	#6793 B
vs.	)	BOND PENDING DECISION UPON
HERMAN LANDFIELD, J. W. OLIVER, JOHN DOE ELLIS, Defendants.	)	WRIT OF ERROR.

KNOW ALL MEN BY THESE PRESENTS, that we, J. W. Oliver of the County of Los Angeles, State

of California, as principal, and Pearl Johnson, AND Berenice Jones as sureties, are jointly and severally held and formally bound to the United States of America to the full and just sum of Five Thousand two hundred fifty dollars ($5,250.00) to be paid to the said United States of America, to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 16th day of March, 1925.

J. W. Oliver
Pearl Johnson
Berenice Jones

WHEREAS lately, at a term of the District Court of the United States, Southern District of California, Southern Division, in a suit pending in said Court, between the United States of America, plaintiff and J. W. Oliver, defendant, a judgment and sentence were made, given and rendered against said J. W. Oliver, and the said J. W. Oliver, having obtained a Writ of Error from the United States Circuit Court of Appeals for the Ninth Circuit, to reverse the judgment and sentence in the aforesaid suit, and a Citation directed to the said United States of America, to be and appear in the United States of America, citing and admonishing the United States of America to be and appear in the United States Circuit Court of Appeals for the Ninth Circuit, at the city of San Francisco, California, pursuant to the terms, and at

the time fixed, in the said citation, which said citation has been duly served and filed, and

WHEREAS, the said J. W. Oliver, has been admitted to bail, pending decision upon said Writ of error in the sum of Five Thousand two hundred fifty dollars ($5,250.00) and the said sureties on this Bond agree and promise that the said J. W. Oliver will pay all costs which may be awarded against him on said Writ of Error or on a dismissal thereof, not exceeding the amount of two hundred fifty ($250.00) dollars, to which amount we acknowledge ourselves jointly and severally bound,

NOW THEREFORE, the condition of the above obligation is such that if the said J. W. Oliver, shall appear, either in person or by his attorney in the United States Circuit Court of Appeals for the Ninth Circuit, on such day or days, as may be appointed for the hearing of said cause in said Court, and prosecute his Writ of Error, and if the said J. W. Oliver, shall abide by and obey all orders made by the United Circuit Court of Appeals for the Ninth Circuit; and if the said J. W. Oliver, shall appear for trial in the District Court of the United States for the Southern District of California, Southern Division, on such day or days, as may be *appointe* for the re-trial by said District Court, if the judgment and sentence against him be reversed by the United States Circuit Court of Appeals for the Ninth Circuit, and if the said J. W. Oliver, shall surr3nder himself in execution of the judgment and sentence aforesaid, if

the said judgment and sentence against him be affirmed by the said Circuit Court of Appeals for the Ninth Circuit, then the above obligation to be void, upon payment by said J. W. Oliver of all or any costs adjudged against him; otherwise, to remain in full force, virtue and effect.

J. W. Oliver
206 W. 89 St.
Principal
Pearl Johnson
Surety
Berenice Jones
Surety

Signed, sealed and acknowledged this 16th day of March, 1925.

UNITED STATES OF AMERICA,)
STATE OF CALIFORNIA, ss
COUNTY OF LOS ANGELES)

Pearl Johnson and Berenice Jones, sureties in the within undertaking, being duly sworn, say, each for himself, and not one for the other that he is worth the sum specified in the said Undertaking over and above all his just debts and liabilities (exclusive of property exempt from execution) and that he is a resident of the State of California and a freeholder therein.

Pearl Johnson
Berenice Jones

Subscribed and sworn to before me this 16th day of March, 1925

Raymond I. Turney (Seal)
United States Commissioner

I hereby approve the form of the within bond and the sufficiency of the sureties thereon.

Raymond L. Turney (Seal)
United States Commissioner.
March 16, 1925.

I have examined the sureties to the within Bond and said Bond is hereby approved and allowed in the amount therein.

A.

(1) Lot 62 on the Pardee tract per Maps recorded in Book 5, page 23 of maps in the office of the County Recorder of said County.

(2) Lot 42 of Shorb and Compton Ave., Blvd. Tract - Recorded in Book 8, page 124 of Maps of Los Angeles, State of California. (3) Lots 42-43-44-45 of Elcoat tract, Los Angeles County State of Cal. Value $12,000, clear.

B.

Southeast ¼ - N. E. ¼ Section 10 Lots 2 and 3 S. W. ¼ of N. E. ¼ - S. E. ¼ of N. W. ¼ - N. E. ¼ of S. W. ¼ of the West ½ half - W. ½ of the N. W. ¼ of Sec. 11 - Township 10 North - Range 28 West San *Barnadino* Meridian

Value $60,000, clear

[ENDORSED]: ORIGINAL IN THE DISTRICT COURT OF THE UNITED STATES, IN AND FOR THE SOUTHERN DISTRICT OF CALIFORNIA,

SOUTHERN DIVISION THE UNITED STATES OF AMERICA, Plaintiff, vs. HERMAN LANDFIELD, J. W. OLIVER, JOHN DOE ELLIS, Defendants. BOND OF DEFENDANT, OLIVER, PENDING DECISION UPON WRIT OF ERROR. Approved Bledsoe U. S. District Judge FILED MAR 16 1925 CHAS. N. WILLIAMS, Clerk G. F. Gibson Deputy

IN THE DISTRICT COURT OF THE UNITED STATES, IN AND FOR THE SOUTHERN DISTRICT OF CALIFORNIA, SOUTHERN DIVISION.

THE UNITED STATES OF AMERICA, Plaintiff,	)	#6793 B
vs.	)	SECOND AMENDED PRAECIPE.
HERMAN LANDFIELD, J. W. OLIVER, JOHN DOE ELLIS, Defendants.	)	

TO THE CLERK OF SAID COURT:

SIR:

Please issue a certified transcript of the following matters and documents or copies thereof, in the above entitled cause, including endorsements upon Writ of Error to the United States District Court for the

Southern District of California, Southern Division, to-wit:

1. Information
2. Arraignment and plea of defendants, Landfield and Oliver
3. Minutes of Trial
4. All Minutes and Orders of Court subsequent to trial
5. Verdict (record); Verdict (filed)
6. Motion of defendants, Landfield and Oliver for a New Trial
7. Petition for a Writ of Error
8. Assignment of Errors
9. Order allowing Writ of Error
10. Supersedeas bonds of defendants, Landfield and Oliver
11. Writ of Error
12. Bill of Exceptions
13. Instructions offered by defendants and rulings thereupon
14. Supersedeas Order
15. Citation to Writ of Error
16. Acceptance of Service of Citation
17. Endorsements on all Papers
18. Copy of this second amended Praecipe.

Please cancel certified Transcript of documents, matters or copies thereof, requested to be issued in the Praecipe and Amended Praecipe, heretofore filed herein.

Dated March 26th, 1925.

Warren L. Williams
Seymour S Silverton
Attorneys for Defendants, Landfield and Oliver.

[ENDORSED]: ORIGINAL #6793 B IN THE DISTRICT COURT OF THE UNITED STATES, IN AND FOR THE SOUTHERN DISTRICT OF CALIFORNIA, SOUTHERN DIVISION THE UNITED STATES OF AMERICA, Plaintiff, vs. HERMAN LANDFIELD, J. W. OLIVER, JOHN DOE ELLIS, Defendants. SECOND AMENDED PRAECIPE FILED MAR 26 1925. CHAS. N. WILLIAMS, Clerk G. F. Gibson Deputy WARREN L. WILLIAMS S. S. SILVERTON 419 Ferguson Bldg. 307 So. Hill Street LOS ANGELES, CAL. Bdwy. 7881 Bdwy. 7880 Attorneys for Defendants, Landfield and Oliver.

IN THE DISTRICT COURT OF THE UNITED STATES, SOUTHERN DISTRICT OF CALIFORNIA, SOUTHERN DIVISION.

THE UNITED STATES OF AMERICA, Plaintiff, vs. HERMAN LANDFIELD, J. W. OLIVER, JOHN DOE ELLIS, Defendants.	CLERK'S CERTIFICATE.

I, CHAS. N. WILLIAMS, Clerk of the United States District Court for the Southern District of California, do hereby certify the foregoing volume containing 155 pages, numbered from 1 to 155, inclusive, to be the Transcript of Record on Writ of Error in the above entitled cause, as printed by the plaintiff-in-error, and presented to me for comparison and certification, and that the same has been compared and corrected by me and contains a full, true and correct copy of the citation, acceptance of service on citation, writ of error, information, arraignment and plea of defendants, minutes of the trial and all minutes and orders of court subsequent to trial, verdict (record), and verdict (filed), instructions offered by defendants and rulings thereupon, motion for new trial, bill of exceptions, assignment of errors, petition for writ of error, order allowing writ of error, supersedeas bonds and supersedeas order.

I DO FURTHER CERTIFY that the fees of the Clerk for comparing, correcting and certifying the foregoing Record on Writ of Error amount to and that said amount has been paid me by the plaintiff-in-error herein.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the Seal of the District Court of the United States of America, in and for the Southern District of California, Southern Division, this day of April, in the year of our Lord One Thousand Nine Hundred and Twenty-five, and of our Independence the One Hundred and Forty-ninth.

CHAS. N. WILLIAMS,
Clerk of the District Court of the United States of America, in and for the Southern District of California.
By
Deputy.

No. 4575.

IN THE

United States

Circuit Court of Appeals,

FOR THE NINTH CIRCUIT.

Herman Landfield and J. W. Oliver,
Plaintiffs in Error,
vs.
The United States of America,
Defendant in Error.

BRIEF OF PLAINTIFFS IN ERROR.

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Attorneys for Plaintiffs in Error.

Parker, Stone & Baird Co., Law Printers, Los Angeles.

INDEX TO PRINTED BRIEF OF PLAINTIFFS IN ERROR.

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STATEMENT OF THE CASE.

On or about the 17th day of October, 1924, an information was filed in the District Court of the United States, of in and for the Southern District of California, Southern Division, which information contained five counts charging the plaintiffs in error herein with a violation of the National Prohibition Act.

In count I of said information it was averred that the said plaintiffs in error did, on or about the 28th day of July, 1924, sell for beverage purposes, to one,

I. W. Cory, one bottle of intoxicating liquor at the agreed price of five dollars ($5.00); in the second count of said information, said plaintiffs in error were charged with selling, on or about the 30th day of July, 1924, a bottle of intoxicating liquor to one, C. W. Ahlin, at a price of seven dollars ($7.00); in the third count it was charged that the plaintiffs in error did, on or about the 7th day of August, 1924, sell to one, Paul Hooke, a pint of intoxicating liquor for seven dollars ($7.00); in the fourth count it was charged that the plaintiffs in error did, on or about the 29th day of August, A. D. 19...., have in their possession about three quarts and one pint of intoxicating liquor; in the fifth count it was alleged that the plaintiffs in error did, on or about the 29th day of August, 1924, maintain a common nuisance in Los Angeles, California, where intoxicating liquor was manufactured, kept, sold and bartered for beverage purposes.

To each and every count in said information contained, each of the plaintiffs in error did enter their plea of "Not Guilty."

There was joined, as a defendant, in the court below, with these plaintiffs in error, one, John Doe Ellis, who was not apprehended at the time of the trial of said cause, and which action against said defendant, Ellis, is still pending in said District Court.

That thereafter, trial of the above entitled cause was had, and the jury returned a verdict, finding the plaintiff in error, Herman Landfield, guilty, as charged in the first count of the information, guilty, as charged

in the second count of the information, not guilty, as charged in the third count of the information, guilty, as charged in the fourth count of the information, and guilty, as charged in the fifth count of the information.

The jury found the plaintiff, J. W. Oliver, not guilty as charged in the first count of the information, not guilty, as charged in the second count of the information, not guilty, as charged in the third count of the information, guilty, as charged in the fourth count of the information, and guilty as charged in the fifth count of the information.

A motion for a new trial having been made in behalf of the defendants in the court below upon the usual statutory grounds, and said motion having been denied, the Honorable Court below made its judgment and sentence that the plaintiff in error, Herman Landfield, be imprisoned in the Orange county jail, in the county of Orange, California, for the term and period of six (6) months upon each of the first and second counts, said terms of imprisonment to begin and run concurrently, and that said plaintiff in error, Landfield, be imprisoned in the Orange county jail for the term and period of one (1) year upon the fifth count of the information, to begin and run concurrently with the terms of imprisonment imposed on the first and second counts, and to pay unto the United States of America, a fine in the sum of one thousand dollars ($1,000.00), and stand committed to the said Orange county jail until said fine shall have been paid, and

upon the fourth count said plaintiff in error, Landfield, was adjudged to pay a fine of one dollar ($1.00.)

As to the plaintiff in error, J. W. Oliver, the Honorable Court below ordered and adjudged that he pay a fine of one dollar ($1.00) on the fourth count of the information, and stand committed to the Orange county jail in the county of Orange, California, for the term and period of six (6) months on the fifth count of said information.

In view of the fact that the court instructed the jury to find the plaintiffs in error not guilty upon the third count charged in the information, and that the jury followed the instruction of the court and found both of the plaintiffs in error not guilty of said third count, said count will not be referred to further in this brief.

From the judgments of the court below, these plaintiffs in error prosecute this writ of error, and assign as grounds for a reversal of said judgments, the matter set forth in the specifications of error.

Specifications of Error.

Plaintiffs in error rely upon the following specifications of error in the prosecution of this writ of error, to-wit:

(1) The verdict of the jury finding the plaintiff in error, J. W. Oliver, guilty of counts four and five of the information, and the judgment and sentence of the court predicated thereon, is against the evidence, and consequently against the law, in that there was

not sufficient legal evidence to establish the guilt of said plaintiff in error of the offenses thereby charged.

(2) The verdict of the jury finding the plaintiff in error, Herman Landfield, guilty of counts first, second, fourth and fifth in said information contained, and the judgment and sentence of the court thereupon, is against the law and the evidence in that the evidence produced by the defendant in error was insufficient to prove the allegations contained in said counts aforesaid in said information.

(3) The court erred in admitting incompetent evidence to the prejudice of plaintiffs in error in that the court permitted, over objection of plaintiffs in error, a witness of and for defendant in error, to testify that he had purchased a bottle of Scotch whiskey from one, Ellis, one of the defendants below, same being without the presence of plaintiffs in error.

(4) The court erred in admitting incompetent evidence to the prejudice of plaintiffs in error, in that the court permitted the witness, Ahlin, a witness of and for defendant in error over objection of plaintiffs in error, to testify that he had purchased liquor from plaintiff in error, Oliver, in October, 1924, which was immaterial and incompetent and irrelevant, being at a time subsequent in point of time to the time of the offenses charged in the informaton, to-wit: On or about August 29th, 1924.

(5) The trial court erred in refusing to direct a verdict of not guilty upon each count of the information as to the plaintiffs in error, Herman Landfield and

J. W. Oliver, at the close of the evidence, upon the ground that the charges contained in the information had not been proven against either of the plaintiffs in error herein.

(6) The trial court erred in refusing to direct a verdict of not guilty as to the plaintiff in error, J. W. Oliver, upon each count in the information contained upon the close of the government's evidence, in that the allegations contained in the information, as to said plaintiff in error, had not been proven.

(7) The trial court erred in itself interrogating the plaintiff in error, Herman Landfield, and over the objections of the plaintiffs in error, directing certain questions to said plaintiff in error, which said questions were improper and argumentative and called for a conclusion of the witness, and were prejudicial to the plaintiffs in error in that the court, by said questions, placed the said plaintiff in error, Landfield, in such a position that to answer the said questions, the said Landfield was compelled to accuse the government agents of having committed a deliberate falsehood.

(8) That the court erred in admitting incompetent evidence to the prejudice of these plaintiffs in error in that the court permitted certain exhibits to be introduced at the trial hereof without any sufficient evidence having been laid for the admission of said testimony.

(9) That the trial court erred in admitting incompetent and immaterial evidence to be introduced to the prejudice of plaintiffs in error, to-wit: That the

court permitted the witness for the defendant in error to testify to a certain raid occurring at the place of plaintiff's in error, and as to what occurred there, and as to the conclusion of the witnesses for the government as to certain matters happening thereat.

(10) That the trial court erred in admitting incompetent evidence to the prejudice of plaintiffs in error, to-wit: In that the court permitted, over the objections of plaintiffs in error, the government to introduce into evidence Government's Exhibit No. III, said exhibit being immaterial and no proper foundation having been laid therefor.

(11) That the trial court erred in its charge to the jury, to the prejudice of these plaintiffs in error, in that the court instructed the jury, contrary to the law as follows:

"When, however, weighing all of the evidence, you have an abiding conviction and belief that the defendant is guilty, it is your duty to convict, and no sympathy, sympathy for him or for his family, if he have one, or for his plight, or anything of that sort, justifies you in seeking for doubts by any strained or unreasonable construction or interpretation of the law or evidence or facts."

(12) That the trial court erred in its charge to the jury, to the prejudice of the defendants, in giving the following instruction, to-wit:

"Now, so much, gentlemen, as to the law involved in the case, just a word or two as to the facts: These defendants are charged in three counts with having

sold liquor, and one count with having possession of liquor, and in the remaining count of having maintained a nuisance. Now, it is true as to the third count, as I remember the evidence, there is not any evidence of a sale of liquor under and pursuant to the terms of that count, so, as to that count, I think it is your plain duty to return a verdict of not guilty. There is no evidence as to the matters charged in that count. Now, there is evidence in the case—the weight or the sufficiency of which it is for you, of course—as to the other remaining counts, and it is your duty to determine the guilt or innocence of the defendants in respect to them also. Now, if you believe the testimony of the government agents who went out to this place, as they say, and, as they say, made purchases of liquor there at that place, and that the defendant Landfield, who was apparently in charge in some capacity, aiding, abetting and cooperating and making it possible for the liquor to be purchased, if you believe that, and believe it beyond a reasonable doubt, that it is a fact, why, of course, he is just as responsible as if he himself had produced the liquor and sold the liquor and taken the money, carried the liquor and did everything about it; and if the defendant, Oliver, as testified by some of the witnesses, co-operated, collaborated with that and knew what was going on, and contributed to it, aided and abetted in so far as he did, why, he would be guilty, of course, of the thing with respect to which he did co-operate and collaborate, remembering, of course, that the guilt of a person has to be determined by what that person does and not by what some other person does or says."

(13) That the trial court erred in its charge to the jury, in that it gave to the jury the following instruc-

tion which is not a correct statement of the law, to-wit:

"There has been some slight suggestion—I say slight suggestion, it was rather lengthily elaborated upon, to the effect that you don't know whether the stuff in these bottles contains more than one-half of one per cent of alcohol by volume. I think it hardly worth the time of the court to elaborate upon that. It could easily be true that somebody might have difficulty in saying what near beer or beer or some other similar substance might or might not contain one-half of one per cent or more of alcohol, or thereabouts, but it would hardly seem that anybody with any experience at all, anybody that was not born day before yesterday, could not tell what gin and whisky is. That is what the testimony is, that gin and whisky was purchased. So, gentlemen, don't let your minds be diverted by any unsubstantial, specious argument like that. It is for you to say what the facts are, what the proof is, and you cannot convict the defendants if you do not believe they sold these things containing more than one-half of one per cent of alcohol. If they did sell it, it would be hardly reasonable to conclude that they were selling something that contained less than one-half of one per cent of alcohol; it would hardly be reasonable to believe that an article of that kind was sold for $5.00 and $7.00 a bottle, if you find it was sold for that, so the whole thing, after you simmer it down, depends upon whether you believe these officers or agents or the defendants. The defendant Landfield says that the officers—the testimony given by the officers was an out and out falsehood, plain perjury. That is the case if his story is to be accepted that he didn't know of the sales being

made and didn't participate in the sales. Then these officers have come here and deliberately perjured themselves, because there cannot be any question under the circumstances but that they went there on these occasions and that they there met and talked with the defendant. No doubt about that. It is hardly a case of mistaken identity or mistaken location. So it is just a question of what you are going to conclude. Are you going to conclude that these officers have come here and deliberately perjured themselves, or are you going to conclude that the defendant, for the purpose of removing the consequences of his own wrong doing, if he did do wrong, has testified falsely in order to escape the consequences. Both of them cannot be telling the truth. You have to determine one way or the other as to where the truth lies. You have to come to a conclusion that will be fair under all of the circumstances, free from passion, free from prejudice, giving the thing the calm, deliberate, careful and close consideration that it requires at your hands, and that it is your duty to give it, remembering that if you have a reasonable doubt of the guilt of the defendants, of course you should acquit them, but if you believe beyond a reasonable doubt that they have conducted themselves as alleged, either of them, it is your plain duty to convict them. Any exceptions to the charge?"

I.

The Verdict of the Jury Finding the Plaintiff in Error, J. W. Oliver, Guilty of Counts Four and Five of the Information, and the Judgment and Sentence of the Court Predicated Thereon, Is Against the Evidence, and Consequently Against the Law, in That There Was Not Sufficient Legal Evidence to Establish the Guilt of Said Plaintiff in Error of the Offenses Thereby Charged.

It will be noted that the counts upon which the plaintiff in error, Oliver, was convicted and sentenced was for having possession of intoxicating liquor on or about the 29th day of August, A. D. ....., and for maintaining a common nuisance on or about the 29th day of August, 1924, at Los Angeles, county of Los Angeles, state of California. It will be noted from the bill of exceptions, which was stipulated to contain a statement of the evidence adduced at said trial, that the plaintiff in error, Oliver, raised the question of the sufficiency of the evidence by a motion for an instructed verdict at the close of the government's case. [Tr. of Record, pp. 63 and 64.]

And also for an instructed verdict at the close of all the evidence in the case. [Tr. of Record, p. 70.] To which ruling upon said motion the plaintiffs in error, then and there duly excepted.

The government's case was presented by three witnesses, to-wit: Mr. I. H. Cory, Mrs. Minnie E. Cory and Mr. C. W. Ahlin. With the exception of Mrs.

Minnie E. Cory, the other two witnesses were prohibition officers. The testimony of all these witnesses, and for the purposes of this argument, the truth of all their testimony will be assumed, and viewed in a most favorable light to the government, as far as the plaintiff in error, Oliver, is concerned, is as follows: The witness Cory testified:

"I arrested Mr. Landfield and Mr. Oliver and this George Cook, who had given me the O. K. card from the first place, and who at that time was acting as a waiter for Mr. Landfield." [Tr. of Record, p. 46.]

"I did not know who the waiter was who brought the lemon juice and cracked ice; I looked for him the night I made the raid and could not find him, a large man, I should judge 5 feet 11. He is not a party to this case." [Tr. of Record, p. 49.]

"The three bottles, government's Exhibit No. 2, were not taken from the defendant, but they were taken from the table at that time." [Tr. of Record, p. 50.]

"I arrested a man by the name of Cook and the Oliver and Landfield." [Tr. of Record, p. 51.]

"These three bottles I had never seen in the possession of the defendant, Landfield, I took them from guests in the place." [Tr. of Record, p. 52.]

The foregoing testimony was the only testimony given by the witness, I. H. Cory, relative to the plaintiff in error, Oliver.

Mrs. Minnie E. Cory, called as a witness in behalf of the defendant in error, testified as follows:

"That she was at the Glendale Tavern on the 28th day of July, 1924, with Mr. Cory and Mr. Hooke;

that she saw the defendant, Herman Landfield, at that time, but not the defendant, J. W. Oliver." [Tr. of Record, p. 53.]

Q. Did you at any time see Mr. Oliver on your visits?

A. I did not. [Tr. of Record, pp. 55 and 56.]

On cross-examination, the witness testified as follows:

"That they inquired as to where Mr. Landfield was from the waiter, but that she could not see if this man was the defendant below, Oliver." [Tr. of Record, p. 56.]

The witness Ahlin testified:

"That on the night of the 30th day of July, 1924, he saw the plaintiffs in error, Landfield and Oliver, at the Glendale Tavern, and that the defendant, Oliver, served *soft drinks* at the table." (Italics are ours.) [Tr. of Record, p. 58.]

The only evidence which in any way would tend to connect Mr. Oliver with any offense against the United States Government is found in the testimony of Agent Ahlin, when he testified, over the objections of the plaintiff in error, that he was out at the Glendale Tavern some time in October and purchased liquor from the plaintiff in error, Oliver. This testimony was objected to by the plaintiffs in error upon the grounds that neither the plaintiff in error, Oliver, or the plaintiff in error, Landfield, were charged with any offense committed in October; that the date of their asserted offense was set forth as the 29th day of August, 1924, in the information, and that the

evidence as to the October offense was too far removed, too remote and incompetent.

The admission of this evidence has been assigned by the plaintiffs in error herein as one of their specifications of error, and since the same will be discussed separately, it is not our intention to burden the court with repetition.

The court will note that the defendant, Oliver, was found guilty, not of selling liquor, but of possession of liquor, and of maintaining a nuisance. We submit that there is absolutely no evidence in the record tending to show even remotely that the said Oliver was guilty of having possession of any alcoholic liquor whatsoever, or of in any manner operating or maintaining or having anything to do with any nuisance whatsoever.

The word *Possess* is defined by Webster: "To have or hold—as property." It has been held to mean the actual control, care and management as distinguished from ownership. (Citing cases from various state jurisdictions.)

(McFadden on Prohibition, page 317.)

While possession may be constructive as well as actual, there is no evidence tending to connect the plaintiff in error, Oliver, either actually or constructively, with having liquor in his possession.

It is true that the court permitted certain evidence to be given of an alleged sale by the plaintiff in error, Oliver, on or about the month of October, 1924, the admission of which testimony it is contended, consti-

tutes error; but said alleged sale is separate from the possession of intoxicating liquor in that the amounts of said liquor and the dates thereof between the sale count and the possession count were far removed. And if this were not the case, it has been held specifically that the offense of unlawful possession of liquor is a crime separate and direct from the crime of the sale of liquor, and is generally conceded by all the authorities.

In commenting on an instruction in the case of Feinberg v. U. S., 2 Fed. Rep. (2nd Series) 955, the court said:

> "Proof of the mere knowledge of the presence of the liquor or of the handling of it as an employee, or of both these facts, did not necessarily show either possession or unlawful possession by the employee."

As far as the count for unlawful possession is concerned, relative to the plaintiff in error, Oliver, the defendant in error is in no better position.

Courts have held specfically that the offense of unlawfully possession liquor is a distinct offense from that of maintaining a nuisance for unlawful selling of liquor.

Massey v. U. S. (C. C. A.), 281 Fed. 293;
Page v. U. S. (C. C. A.), 278 Fed. 41;
Bell v. U. S. (C. C. A.), 285 Fed. 145;
Singer v. U. S. (C. C. A.), 288 Fed. 695.

It is true that this Honorable Court has held that under certain circumstances, proof of one sale of al-

coholic liquors might tend to establish the maintenance of a nuisance, but the circumstances must be such as to show that a resort or a place where liquor is kept for sale, barter or other commercial purpose is being maintained. Or to state the rule in the language of the courts,

> "The test of a statutory nuisance, therefore, is not the number of sales or the length of time liquor is kept upon the premises, but whether the place is maintained for the keeping and sale of liquor in the sense of the statute."
>
> Singer v. U. S. (C. C. A.), 288 Fed. 695.

Upon the question of what constitutes a nuisance, a majority of the courts hold that a single sale or a single act in violation of the National Prohibition Act, does not constitute the offense of maintaining a nuisance, and the reasoning of some of the decisions is to the effect that by the use of the words "sold," "kept" or "bartered," there was meant either habitually or continuously or concurrently so sold, kept or bartered, and that the word "maintenance" implies continuation or some degree of permanency.

Reynolds v. U. S., 282 Fed. 257;
Hattner v. U. S., 293 Fed. 387.

However, there is nothing inconsistent in the holding of these cases with the holding of this Honorable Court since continuity of wrong doing may appear from, or be implied from the nature and circumstances of a single sale, or other transaction.

In view of the evidence hereinbefore presented, and in view of the further fact that the only proof ad-

duced in the case was to the effect that the plaintiff in error, Oliver, was only a waiter at the premises in question, was not shown to have any proprietory, managerial, supervisory or directory connection with the premises in question, or any control of any liquors therein, the evidence is insufficient, even assuming the competency and relevancy of all the evidence in the record, to sustain a conviction of the counts upon which said plaintiff in error was convicted.

II.

The Verdict of the Jury Finding the Plaintiff in Error, Herman Landfield, Guilty of Counts First, Second, Fourth and Fifth in Said Information Contained, and the Judgment and Sentence of the Court Thereupon, Is Against the Law and the Evidence in That the Evidence Produced by the Defendant in Error Was Insufficient to Prove the Allegations Contained in Said Counts Aforesaid in Said Information.

The defendant below, Herman Landfield, was found guilty in the first count of a sale to the witness, Cory, in the second count, of a sale to the witness, Ahlin, upon the fourth count of possession, and upon the fifth count of maintaining a nuisance.

As we stated in the preceding specification of error, as far as the possession charge was concerned, the evidence shows that the liquor introduced in evidence as Exhibit No. 3 of defendant in error, was taken from guests sitting at the tables of the restaurant,

which plaintiff in error was then managing. The testimony upon this point is as follows:

"The third time we went there was, I believe, on the 28th of August. I went there with a raiding crew." [Tr. of Record, p. 45.]

"During it all, we succeeded in getting from the tables, or thereabouts, three bottles, two bottles of gin, and one bottle containing Scotch whiskey, about one-half full. * * * Mr. Landfield said, 'Well, I'm not responsible for this stuff in my place.' He said the guests brought it in and he didn't see how he could keep them out. * * * These three bottles were found in the premises at the time of the raid on the 28th day of August, it says here. The three bottles, government's Exhibit No. 2, were not taken from the defendant, but they were taken from the table at that time. * * * These three bottles I had never seen in the possession of the defendant, Landfield. I took them from guests in the place. [Tr. of Record, pp. 45, 46, 49, 50 and 51.]

The witness testified further, that he never obtained any liquor directly from either of the plaintiffs in error. The three bottles seized on this raid were introduced as government's Exhibit No. 3, and the jury convicted the defendant below, Landfield, upon the count charging possession of said bottles of liquor. Consequently there is no proof to show this defendant guilty of possession of said intoxicants.

Relative to the sale to Mr. Cory of a bottle of intoxicating liquor, the testimony is that the witness, Cory, engaged Mr. Landfield in a conversation relative to prize fighting, and then after that Mr. Land-

field told him that he did not serve any mixed up drinks or straight drinks at the table, but that he would get him the makings. That Mr. Landfield then introduced him to Mr. Ellis, and that the witness gave Mr. Ellis $5.00 for the bottle. That Landfield did not actually take the money, but that he was there, and that he, Mr. Cory, came in upon a later occasion and introduced Mr. Ahlin to Mr. Landfield. [Tr. of Record, pp. 40-42.]

Mrs. Minnie E. Cory, the government's witness, testified as follows:

"That Mr. Landfield said he could not serve them any drinks at the table." [Tr. of Record, p. 53.]

"Q. Were you there on any other occasion?

A. No, sir.

Q. Did you at any time see Mr. Oliver on your visits?

A. I did not." [Tr. of Record, pp. 55 and 56.]

"Mr. Landfield said that he would see that we got a bottle of gin."

While it is true that the credibility of the testimony of witnesses is for the jury, it might be herein noticed that according to the witness, Cory, "Ellis is 5 feet, 6 or 7, not so very tall, dark complexion, black eyes, weighing, I should judged, about 175 or 180 pounds." [Tr. of Record, p. 52.]

Minnie E. Cory, another witness for the government, testified, "I have seen Mr. Ellis, and I saw him before the 28th day of July, 1924. He is a man probably 5

feet 10, slender, light complected, or light hair. [Tr. of Record, p. 56.]

The witness, Ahlin, testified that he was introduced to Mr. Landfield by Mr. Cory; that Mr. Ellis came to the table and that the witness was introduced to him. That Mr. Ellis beckoned to him to come over to the little room off the dance room and delivered a bottle of the liquor. The liquor was bought out there at the Glendale Tavern from Mr. Ellis. "The defendant, Landfield, was in the premises some place when I bought it. He was not in my immediate presence when I purchased the liquor from Mr. Ellis. I was in the room by myself with Mr. Ellis." [Tr. of Record, pp. 58 and 59.]

It is respectfully submitted to this Honorable Court that the evidence shows nothing further than the defendant below, Landfield, merely assisted the government's witness to purchase liquor, and that there is no testimony whatsoever in the record tending to show that said defendant below, Landfield, profited in any way whatsoever in the said transactions, or received any money or that there was any relationship between him and the so-called defendant, Ellis, to sell liquor.

A purchaser of liquor is not criminally liable, as the National Prohibition Law is against the sale of liquor and not against the purchase of liquor, and a person who assists the purchaser is not liable.

(McFadden on Prohibition, p. 294.)

Referring once more to the nuisance count upon which this defendant was convicted, we desire to draw

the court's attention to the case of Muncy v. U. S., 289 Fed. 780, where the court said:

> "The only question, therefore, which we have to determine, is whether the evidence of the sale of the pint of liquor, as mentioned, justifies a verdict of guilty of maintaining a nuisance under the terms of the act. As has been already stated, no liquor was found on defendant's person or on premises under her exclusive control. Except as to the pint which the officer claims to have purchased from her, there was no evidence either of sale or possession. It is true the officer claims to have been told by the boy who guided them to the defendant's apartment that he had gotten whiskey from her; but the statement was not made in her presence, and was afterwards denied by the boy when he became a witness in the trial. The defendant conducted a laundry in her apartment and was engaged in that work when arrested, and there is, as far as the record before us shows, an entire absence either of facts or inferences from which we may say that the storage or sale of the whisky was one of the ordinary or usual incidents to the business conducted by the defendant or on her premises. The case made was the case of a single sale—the premises the ordinary home of a woman of the laboring class—and this, we believe, without more, is not enough."

III.

The Court Erred in Admitting Incompetent Evidenc to the Prejudice of Plaintiffs in Error in That the Court Permitted, Over Objection of Plaintiffs in Error, a Witness of and for Defendant in Error, to Testify That He Had Purchased a Bottle of Scotch Whiskey From One, Ellis, One of the Defendants Below, Same Being Without the Presence of Plaintiffs in Error.

The said evidence objected to is as follows:

Q. I will ask you if you have ever seen this bottle before (handing bottle to witness),

A. I have. [Tr. of Record, p. 58.]

Q. Where?

A. It was bought out there at the Glendale Tavern from Mr. Ellis.

Q. Is that the bottle you bought from Mr. Ellis?

A. It is.

Q. Where was the defendant Landfield when you bought that?

A. In the premises some place.

Q. Was he in your immediate presence when you purchased this from Mr. Ellis?

A. I was in the room by myself with Mr. Ellis.

Mr. Williams: I move that all of that testimony be stricken out on behalf of the defendants Landfield and Oliver.

The Court: Denied.

Mr. McGann: Q. Did you examine the contents of that bottle at that time?

A. We did.

Q. What did you ascertain the contents of that bottle to be?

A. Scotch whisky.

Mr. Williams: We object to that as immaterial and no foundation laid.

The Court: Do you know Scotch whisky when you taste it?

A. Yes, sir.

Q. Did you taste this?

A. Yes, sir. [Tr. of Record, p. 59.]

Q. Was that Scotch whisky?

A. Yes, sir.

Q. It was?

A. Yes, sir.

Mr. Williams: I move that that be stricken out as calling for the conclusion of the witness and no foundation laid.

The Court: Denied.

Mr. Williams: Exception. [Tr. of Record, p. 60.]

It is submitted that this evidence is hearsay evidence, occurring without the presence of plaintiff in error, and should have been excluded by the court.

IV.

The Court Erred in Admitting Incompetent Evidence to the Prejudice of Plaintiffs in Error, in That the Court Permitted the Witness, Ahlin, a Witness of and for Defendant in Error Over Objection of Plaintiffs in Error, to Testify That He Had Purchased Liquor From Plaintiff in Error, Oliver, in October, 1924, Which Was Immaterial and Incompetent and Irrelevant, Being at a Time Subsequent in Point of Time to the Time of the Offenses Charged in the Information, To-wit. On or About August 29th, 1924.

The said evidence objected to is as follows:

"Mr. McGann: Q. Were you at that address at any other time?

A. I was out there at a later date.

Q. What date?

A. Around in October sometime.

Q. What was the occasion of your visit?

Mr. Williams: We object to any October visit on the ground that it is immaterial, and not within the time charged in this information.

The Court: Denied.

Mr. Williams: The last date mentioned was October.

The Court: They are charged with maintaining a nuisance on or about the 29th day of August, and any time either before or after that, within a reasonable degree, would be relevant.

Mr. Williams: We renew our objection to the October visit on the ground that it is too far removed, too remote, and incompetent.

The Court: Overruled. [Tr. of Record, p. 60.]

Mr. Williams: Exception.

Mr. McGann: Q. What was the purpose of your visit?

A. With Agent Bybee we visited these premises again and we then purchased liquor. This liquor was purchased by me of Oliver in the presence of Mickey Murphy, who was the main proprietor of the place at that time.

Mr. Williams: I move that that all be stricken out as immaterial to the issues contained in this indictment.

The Court: Denied.

Mr. Williams: Exception.

Mr. McGann: Q. What date was that, if you know?

A. I don't just recall the date; I haven't got my records with me.

Q. Now, were you there at any other time other than the two times you have mentioned?

A. No, sir.

Q. I take it you were not present at the time of the raid?

A. I was not.

Mr. McGann: Take the witness." [Tr. of Record, p. 60.]

It will be noted that this testimony could not have been admissible against the defendant, Landfield, because the witness himself stated that he purchased the liquor of Oliver in the presence of Mickey Murphy, who was then the proprietor of the place, and that there was no evidence in the record that the defendant,

Landfield, was in the place or in the state of California in October, 1924. The sale in October, 1924, was not alleged in the information. The last date mentioned in the information was on or about the 29th day of August, 1924, and in view of the testimony hereinbefore set forth, it may easily be seen how prejudicial this testimony was to the defendants below.

Seasonable objection was made to the admission of said testimony. It did not in any way tend to prove or disprove the issues of the case, was unfair to the defendants below in that they were not apprised of the prosecution's intention to use the said testimony, and consequently could not anticipate it, and therefore could not prepare against it. It is the only testimony in the record tending in any way to involve the defendant below, Oliver, and said testimony does not in any way connect the defendant below, Landfield, with said sale. The general proposition of law upon the point, we believe to be, that

Evidence of sales at times other than those covered by the information should not be received in evidence, as the question of intent is not material in this class of cases.

Hall v. U. S., 150 U. S. 76;
Hurwitz v. U. S., 299 Fed. 449;
Garb v. U. S., 294 Fed. 66;
Carpenter v. U. S., 280 Fed. 598;
Paris v. U. S., 260 Fed. 529;
Beyer v. U. S., 282 Fed. 225.

The court evidently admitted said testimony upon the ground that it might tend to prove or disprove the nuisance, but the nuisance count upon which both of the defendants below, plaintiffs in error herein, were convicted, alleges the nuisance as of date on or about August 29, 1924, and we submit this testimony is too remote to be admissible thereupon.

V.

The Trial Court Erred in Refusing to Direct a Verdict of Not Guilty Upon Each Count of the Information as to the Plaintiffs in Error, Herman Landfield and J. W. Oliver, at the Close of the Evidence, Upon the Ground That the Charges Contained in the Information Had Not Been Proven Against Either of the Plaintiffs in Error Herein.

VI.

The Trial Court Erred in Refusing to Direct a Verdict of Not Guilty as to the Plaintiff in Error, J. W. Oliver, Upon Each Count in the Information Contained Upon the Close of the Government's Evidence, in That the Allegations Contained in the Information, as to Said Plaintiff in Error, Had Not Been Proven.

These specifications of error will be considered together as they cover the same proposition of the law. The proceedings had under specification V are as follows:

"Mr. Williams: At this time, in compliance with the practice of this court, I desire at this time to move, on behalf of the defendant, J. W. Oliver, as to count 1 of this information, that the jury be instructed to acquit the defendant, J. W. Oliver, on the ground—

The Court: The motion will be denied, and it may be considered as having been made on behalf of each of the defendants as to each count of the indictment, and denied.

Mr. Williams: I would like to make my motion, if the court please.

The Court: I said it might be considered as made to all defendants on all counts, and denied.

Mr. Williams: I desire to move also as to count 2—

The Court: I said it might be considered as having been made with respect to each defendant and as to each count, and denied.

Mr. Williams: That includes counts 3, count 4 and count 5?

The Court: Yes, and denied. Proceed.

Mr. Williams: Now, on behalf of the defendant, Herman Landfield, I desire to move this court that the jury be instructed—

The Court: It has been suggested, Mr. Williams, that—

Mr. Williams: Wait a minute, if the court please; I haven't made my motion.

The Court: I said it might be considered as to each defendant and each count, and the motion denied.

Mr. Williams: I should like the court to know there are five counts.

The Court: I know there are five counts, and it may be considered as made to five counts by each defendant, and denied.

Mr. Williams: For the purpose of the record—

The Court: So now that ought to be understood, proceed.

Mr. Williams: Very well. Mr. Landfield take the stand, please." [Tr. of Record, pp. 63 and 64.]

Upon the proceedings had relative to specification VI, they are as follows:

"Mr. Williams: The defendants rest, with this exception: I desire at this time to renew my motions.

The Court: Denied.

Mr. Williams: Just a moment. I haven't made my motions.

The Court: It may be considered as having been made and denied.

Mr. Williams: For the purpose of the record I desire to make the motion on behalf of defendants Landfield and Oliver.

The Court: It may be considered as having been made to each defendant on each count, the motion to dismiss on each count, and it is denied. Proceed.

Mr. Williams: I desire to make my motion, if the court please.

The Court: It may be regarded as having been made to each count and as to each defendant, and denied.

Mr. Williams: Exception. On count 3 there is no testimony to substantiate that count, and I move that that be dismissed.

The Court: Denied.

Mr. Williams: I don't want to have any argument.

The Court: Any rebuttal?

Mr. McGann: No rebuttal." [Tr. of Record, p. 70.]

Since the points covered by these specifications have been discussed in specifications of error I and II, we will not take up the time of the court further on these points.

VII.

The Trial Court Erred in Itself Interrogating the Plaintiff in Error, Herman Landfield, and Over the Objections of the Plaintiffs in Error, Directing Certain Questions to Said Plaintiff in Error, Which Said Questions Were Improper and Argumentative and Called for a Conclusion of the Witness, and Were Prejudicial to the Plaintiffs in Error in That the Court, by Said Questions, Placed the Said Plaintiff in Error, Landfield, in Such a Position That to Answer the Said Questions, the Said Landfield Was Compelled to Accuse the Government Agents of Having Committed a Deliberate Falsehood.

The proceedings as they are material to this specification of error, are as follows:

"The Court: Q. Where is this place in Glendale?

A. 1120 South San Fernando boulevard.

Q. Inside of the City of Glendale?

A. Yes, sir.

Q. All of these statements these witnesses have made that they bought liquor there at your place from you or through you is all false?

A. Absolutely, Your Honor.

Q. They have just come here and told a deliberate falsehood?

Mr. Williams: We will have to object to that question, Your Honor, on the ground it is argumentative.

The Court: Overruled.

Mr. Williams: Exception.

The Court: Q. That is a fact, is it not?

A. Yes, sir." [Tr. of Record, p. 68.]

The asking of these questions in such a manner as to compel the defendant to accuse the government's agents of testifying to a deliberate falsehood, these plaintiffs in error assign as error. Since this point will again be discussed in a subsequent specification of error, we will not further discuss it here.

VIII.

That the Court Erred in Admitting Incompetent Evidence to the Prejudice of These Plaintiffs in Error in That the Court Permitted Certain Exhibits to Be Introduced at the Trial Hereof Without Any Sufficient Evidence Having Been Laid for the Admission of Said Testimony.

Since the argument is more or less similar upon the inadmissibility into evidence of these exhibits which were introduced separately, they will be considered together. We will consider the testimony relative to the admission of these exhibits as follows:

"Mr. McGann: Q. Where did you first see that bottle, Mr. Cory?

A. I first saw that bottle when Mr. Ellis handed it to me in the small room in the Glendale Tavern in the presence of Mr. Landfield. I paid him $5.00 for it.

Q. What date was that?

A. It is marked here (indicating) 'Date of buy 7/28/24.' The 28th day of July. 'Paid, $5.50.'

Q. Did you examine the contents of that bottle at the time?

A. I drank two drinks out of it; yes, sir.

Q. What was it?

A. Gin.

Mr. Williams: I object to that as calling for a conclusion of the witness, and no proper foundation laid for the question.

The Court: Do you know gin when you taste it?

A. Yes, sir.

Q. Have you had enough experience to know what it is if you taste it?

Yes, sir.

The Court: Overruled.

Mr. Williams: Exception.

Mr. McGann: I will ask that this be admitted in evidence.

Mr. Williams: I object to it on the ground that there is no proper foundation laid for its introduction.

The Court: In what way is there no proper foundation laid?

Mr. Williams: No foundation laid in this: That the witness had not been properly qualified to testify as to what the contents of this bottle is.

The Court: It is a matter of common knowledge what gin contains. Did it contain more than one-half of one per cent of alcohol by volume?

A. It did.

Mr. Williams: I object to that on the ground that the witness is not qualified to testify to that.

The Court: Overruled.

Mr. Williams: Exception.

The Court: All right. Go on." [Tr. of Record, pp. 40, 41 and 42.]

"Mr. McGann: Q. I will ask you to examine this bottle, Mr. Cory.

A. Yes, sir.

Q. Where did you first see that bottle?

A. I saw that bottle first when it came onto the table—rather, when Agent Ahlin took it out of his pocket in the Glendale Tavern.

Q. Did you examine the contents at that time?

A. I had a drink out of it, possibly two.

Q. What would you say the contents of the bottle was?

Mr. Williams: I object to that as immaterial, calling for a conclusion of the witness, and no proper foundation laid.

The Court: Overruled.

Mr. Williams: Exception.

A. I would say that it is Scotch Whisky.

The Court: Do you know Scotch whisky when you taste it?

A. Yes, sir.

Mr. Williams: We object to his statemnt that he knows Scotch whisky when he tastes it, and I renew my objection that the proper foundation has not been laid.

The Court: Some people, I suppose, know it. This witness says he does. Overruled.

Mr. Williams: Exception.

Mr. McGann: I ask at this time to introduce in evidence Government's Exhibit No. 2.

Mr. Williams: The same objection. No proper foundation laid.

The Court: Overruled. In what respect is the foundation insufficient?

Mr. Williams: It has not been shown what the bottle contains. It might be gingerale, from the color of it, for all we know.

The Court: I know, but color is not the only thing that goes into the consideration of what it is. If he said he looked at the color and said it was Scotch whisky, that would be different, but he didn't do that. He said he tasted it. Overruled.

Mr. Williams: Exception.

(Witness continuing) We stayed there a short time, and as soon as possible, got out of the place, and this bottle was taken back by Agent Ahlin and labeled by himself, and it was also sent to the United States chemist in San Francisco." [Tr. of Record, pp. 43, 44 and 45.]

"Mr. McGann: Q. I will ask you to examine these three bottles.

A. These three bottles were found in the premises at the time of the raid on the 28th day of August, it says here (indicating).

Mr. Williams: I move that 'it shows here' be stricken out as hearsay.

The Court: Denied.

Mr. Williams: Exception.

A. It is on the label here (indicating).

Mr. McGann: Q. Now, did you examine the contents of the three bottles at that time?

A. Yes, sir; I did.

Q. What sort of an examination did you make, Mr. Cory?

A. I sat at the table there making the return on the search warrant, and as the agents found the liquor they brought it over to me and I smelled it and tasted it to make sure what it was, and then I gave Mr. Landfield a return on the search warrant for them.

Q. What did you find the contents of these bottles to be?

A. These two bottles, so called 'gin.' This other bottle is Scotch whisky.

Mr. Williams: I move that that answer be stricken out on the ground there is no proper foundation laid, and calling for a conclusion of the witness.

The Court: Overruled.

Mr. Williams: Exception.

Mr. McGann: I ask at this time, if the court please, that the three bottles, the two bottles of gin and the one bottle of Scotch whisky, be accepted in evidence as Government's Exhibit No. 3.

Mr. Williams: I object to their introduction as immaterial, and no proper foundation laid.

The Court: Are you still bothered with the color, or is it something else?

Mr. Williams: The color looks quite natural. It looks like water.

The Court: In what respect is the foundation insufficient.

Mr. Williams: This witness is not qualified.

The Court: You still know gin and whisky, do you?

A. Yes, sir.

Q. When you taste them?

A. Yes, sir.

Q. And you tasted those bottles?

A. Yes, sir.

Q. And it was gin and whisky?

A. Yes, sir.

Mr. Williams: I object to that and move that the answer be stricken out as immaterial, and object to the introduction of the testimony, on the same ground.

The Court: Denied.

Mr. Williams: Exception.

Mr. McGann: Q. You testified that the waiter brought you some lemon juice.

Mr. Williams: Has the Government introduced these three bottles?

Mr. McGann: Yes.

Mr. Williams: Has Your Honor ruled upon their introduction?

The Court: Yes.

Mr. Williams: I desire an exception to that ruling." [Tr. of Record, pp. 47 and 48.]

It is submitted that no sufficient foundation was laid for the introduction into evidence of any of said exhibits.

It is an elementary proposition of law that in order to lay a foundation for the introduction into evidence of an exhibit, four things must be shown. First, that the evidence was taken from the defendants; second, the condition of the article taken when it was taken from the defendants; third, that the exhibit sought to be introduced is still in the same condition as it was when it was taken from the defendants; fourth, that the evidence is what it purports to be.

There is not one scintilla of evidence in the record tending to show what was in the bottles introduced in evidence. No chemist testified as to the contents of the said bottles. It was not shown what the analysis thereof was. There was no evidence in the record whatsoever to show that the contents of the bottles had not been changed during the time they were in the chemist's hands, if they were in his hands during all of

said times. Further, the foundation for the introduction into evidence of said articles was lacking in that there was not sufficent showing as to the experience of the witnesses for the defendant in error as to their knowledge of alcoholic liquors, or that they knew what they were drinking and the chemical contents thereof.

IX.

That the Trial Court Erred in Admitting Incompetent and Immaterial Evidence to Be Introduced to the Prejudice of Plaintiffs in Error, To-wit: That the Court Permitted the Witness for the Defendant in Error to Testify to a Certain Raid Occurring at the Place of Plaintiffs in Error, and as to What Occurred There, and as to the Conclusion of the Witnesses for the Government as to Certain Matters Happening thereat.

The said evidence objected to is as follows:

"The third time I went there was, I believe, on the 28th day of August. I went there with a raiding crew." [Rep. Tr., p. 13, line 14, to p. 18, line 10.]

"Mr. McGann: Q. Who was present at the time of the raid?

A. Agent Glynn, Agent Plunkett, Whittier, Hooke, and Agent Cass from San Diego, and Agent Tyson, of the Los Angeles office. We went there on a search warrant which I had procured on affidavit before United States Commissioner Long, alleging these sales.

Mr. Williams: I move it be stricken out as immaterial and not the best evidence.

The Court: Denied. It is harmless.

Mr. Williams: Exception.

Mr. McGann: Q. Then what did you do?

A. We entered the place, and immediately the place was in an uproar.

Mr. Williams: I move that be stricken out as a conclusion.

The Court: Denied. Harmless.

Mr. Williams: Exception.

A. (Continuing.) And bottles were thrown to the floor and broken, bottles and glasses were thrown around, and one agent was assaulted, Agent Cass, I believe.

Mr. Williams: I move that all of that be stricken out as calling for a conclusion of the witness.

The Court: Denied.

Mr. Williams: Exception.

A. (Continuing.) During it all we succeeded in getting from the tables, or thereabouts, three bottles, two bottles of gin and one bottle containing Scotch whisky, about half full. I arrested Mr. Landfield and Mr. Oliver, and this George Cook, who had given me the o. k. card from the first place, and who at that time was acting as a waiter for Mr. Landfield.

Mr. Williams: I move that that answer be stricken out as immaterial and no foundation laid.

The Court: Denied.

Mr. Williams: Exception.

A. (Continuing.) At that time I took Mr. Landfiend and sat him down in a chair, and he got up and started to run around, and I sat hm down again and told him I didn't want him to get up again or I would put the handcuffs on him, and that he had better be a little quiet. He said, 'Well, I am not responsible for this stuff in my place.' He said, 'The guests brought it in and how am I going to keep them out?'

I said, 'Mr. Landfield, that is your business. If you have liquor that is in the quantity that is in this place, and let your guests bring it in, and you don't stop them, you are responsible, and the Federal Government are going to keep your place clean.'

Mr. Williams: We object to all of that and move that it be stricken out as immaterial." [Tr. of Record, pp. 45 and 46.]

Upon cross-examination, the witness testified as follows:

"During the confusion, Mr. Landfield was running around. I sat Mr. Landfield down and I told him to sit down or I would have to put the handcuffs on him. I told him if he did not sit down that I would knock him down. Everybody in the place seemed to have liquor on the tables or under the tables. *I did not see any liquor on any of the tables; I just judged from general conditions.*" (Italics ours.) [Tr. of Record, p. 51.]

The introduction of which evidence, these plaintiffs in error submit, was highly prejudicial to them.

X.

That the Trial Court Erred in Admitting Incompetent Evidence to the Prejudice of Plaintiffs in Error, To-wit: In That the Court Permitted, Over the Objections of Plaintiffs in Error, the Government to Introduce Into Evidence Government's Exhibit No. III, Said Exhibit Being Immaterial and No Proper Foundation Having Been Laid Therefor.

The proceedings relative to this specification of error have been hereinbefore set forth, and the argument

thereupon is similar to that set forth in support of plaintiffs' specification of error number VIII.

XI.

That the Trial Court Erred in Its Charge to the Jury, to the Prejudice of These Plaintiffs in Error, in That the Court Instructed the Jury, Contrary to the Law as Follows:

"When, however, weighing all of the evidence, you have an abiding conviction and belief that the defendant is guilty, it is your duty to convict, and no sympathy, sympathy for him or for his family, if he have one, or for his plight, or anything of that sort, justifies you in seeking for doubts by any strained or unreasonable construction or interpretation of the law or evidence or facts." [Tr. of Record, p. 80.]

By said instruction, the jury was told that if they had "an abiding conviction and belief that the defendant is guilty" it was their duty to convict, we submit is a misstatement of the law in view of the fact that said abiding conviction and belief must be beyond a reasonable doubt.

XII.

That the Trial Court Erred in Its Charge to the Jury, to the Prejudice of the Defendants in Giving the Following Instruction, To-wit:

"Now, so much, gentlemen, as to the law involved in the case, just a word or two as to the facts: These defendants are charged in three counts with having sold liquor, and one count with having possession of

liquor, and in the remaining count of having maintained a nuisance. Now, it is true as to the third count, as I remember the evidence, there is not any evidence of a sale of liquor under and pursuant to the terms of that count, so, as to that count, I think it is your plain duty to return a verdict of not guilty. There is no evidence as to the matters charged in that count. Now, there is evidence in the case—the weight or the sufficiency of which it is for you, of course—as to the other remaining counts, and it is your duty to determine the guilt or innocence of the defendants in respect to them also. Now, if you believe the testimony of the Government agents who went out to this place, as they say, and, as they say, made purchases of liquor there at that place, and that the defendant Landfield, who was apparently in charge in some capacity, aiding, abetting and co-operating and making it possible for the liquor to be purchased, if you believe that, and believe it beyond a reasonable doubt, that it is a fact, why, of course, he is just as responsible as if he himself had produced the liquor and sold the liquor and taken the money, carried the liquor and did everything about it; and if the defendant, Oliver, as testified by some of the witnesses, co-operated, collaborated with that and knew what was going on, and contributed to it, aided and abetted in so far as he did, why, he would be guilty, of course, of the thing with respect to which he did co-operate and collaborate, remembering, of course, that the guilt of a person has to be determined by what that person does and not by what some other person does or says." [Tr. of Record, pp. 82 and 83.]

By said instruction, the jury was told, "Now, there is evidence in the case—the weight or the sufficiency

of which it is for you, of course—as to the other remaining counts, and it is your duty to determine the guilt or innocence of the defendants in respect to them also", which we submit was not a proper instruction to give the jury in view of the fact that there was no other sufficient evidence as to any other counts charged in the information as to defendants' guilt, and especially as to counts III and IV upon behalf of defendants below, Landfield and Oliver.

By said instruction, the jury was also instructed that certain witnesses had testified that Oliver co-operated or collaborated and knew what was going on, and contributed to it and aided and abetted it "in so far as he did", that they might find the defendant, Oliver, guilty, when there was no testimony in the record to show that Oliver co-operated, collaborated or knew what was going on, or no facts from which said inference could be indulged in.

Said instruction is also erroneous in point of law in that the jury were instructed that if he, the defendant Landfield, aided, abetted or co-operated or made it possible for the liquor to be *purchased* (italics ours) that he would be just as responsible as if he had sold the liquor and taken the money.

XIII.

That the Trial Court Erred in Its Charge to the Jury, in That It Gave to the Jury the Following Instruction Which Is Not a Correct Statement of the Law; To-wit:

"There has been some slight suggestion—I say slight suggestion, it was rather lengthily elaborated upon, to

the effect that you don't know whether the stuff in these bottles contains more than one-half of one per cent of alcohol by volume. I think it hardly worth the time of the court to elaborate upon that. It could easily be true that somebody might have difficulty in saying what near beer or beer or some other similar substance might or might not contain one-half of one per cent or more of alcohol, or thereabouts, but it would hardly seem that anybody with any experience at all, anybody that was not born day before yesterday, could not tell what gin and whisky is. That is what the testimony is, that gin and whisky was purchased. So, gentlemen, don't let your minds be diverted by any unsubstantial, specious argument like that. It is for you to say what the facts are, what the proof is, and you cannot convict the defendants if you do not believe they sold these things containing more than one-half of one per cent of alcohol. If they did sell it, it would be hardly reasonable to conclude that they were selling something that contained less than one-half of one per cent of alcohol; it would hardly be reasonable to believe that an article of that kind was sold for $5.00 and $7.00 a bottle, if you find it was sold for that, so the whole thing, after you simmer it down, depends upon whether you believe these officers or agents or the defendants. The defendant Landfield says that the officers—the testimony given by the officers was an out and out falsehood, plain perjury. That is the case if his story is to be accepted that he didn't know of the sales being made and didn't participate in the sales. Then these officers have come here and deliberately perjured themselves, because there cannot be any question under the circumstances but that they went there on these occasions and that they there met and talked with the defendant.

No doubt about that. It is hardly a case of mistaken identity or mistaken location. So it is just a question of what you are going to conclude. Are you going to conclude that these officers have come here and deliberately perjured themselves, or are you going to conclude that the defendant, for the purpose of removing the consequences of his own wrong doing, if he did do wrong, has testified falsely in order to escape the consequences. Both of them cannot be telling the truth. You have to determine one way or the other as to where the truth lies. You have to come to a conclusion that will be fair under all of the circumstances, free from passion, free from prejudice, giving the thing the calm, deliberate, careful and close consideration that it requires at your hands, and that it is your duty to give it, remembering that if you have a reasonable doubt of the guilt of the defendants, of course you should acquit them, but if you believe beyond a reasonable doubt that they have conducted themselves as alleged, either of them, it is your plain duty to convict them. Any exceptions to the charge?" [Tr. of Record, p. 85.]

Said instruction is erroneous in that it instructed the jury that without any evidence as to what the percentage of the liquid in said bottles was, they could find said defendants below guilty. Said instruction is also erroneous in that the jury was instructed that the defendants were guilty, and had testified falsely, or that they would have to arrive at the conclusion that the government officers came into court and deliberately perjured themselves. There were other conclusions which the jury might have reached consistent with the innocence of the defendants, and also with

the fact that the government witnesses might have been mistaken or some other conclusion not admitting that they had deliberately committed perjury.

The defendants then and there excepted to said instructions heretofore given as follows:

"Mr. Williams: On behalf of the defendants, I desire to note an exception to Your Honor's charge, and the whole thereof, and in particular to the charge as to the court's duty in commenting on the evidence; also I desire to note an exception to Your Honor's charge as to the impeachment of witnesses; I also desire to note an exception to Your Honor's charge on the interest of the defendant Landfield. I also desire to note an exception to Your Honor's charge and comment on principal and accessory, aider and abetter. I also desire to note an exception as to the defendant Oliver. I also desire to note an exception to the instruction and comment on the possession of the liquor. I also desire to note an exception to the comment and instruction as to the alcoholic content of the alleged liquor. I also desire to note an exception to the comment and instruction as to the testimony of the Government officers. I also desire on behalf of the defendants to note an exception to the failure of the court to give the instructions requested by the defendants." [Tr. of Record, p. 88.]

In passing, we ask the court to notice the plain error not specifically assigned, to wit: Count fourth in the information, which is to the effect "That on or about the 29th day of August, A. D. 19—, the defendants below had possession of intoxicating liquor." No amendment was made or offered to the information, and it is the contention of the plaintiffs in error that

the information does not state an offense punishable under the laws of the United States, in that the date in question might have been previous to the going into effect or enactment of the National Prohibition Law; and by the same token, that the Twentieth Century is not over, and that no intendments as to the continuation of the National Prohibition Law throughout the Twentieth Century can be indulged in.

> Where an information fails to state an offense punishable under the laws of the United States, and the question was not presented to the trial court, nevertheless it follows, that a sentence cannot be imposed upon a verdict of guilty as charged in the information or indictment, if the information or indictment does not state an offense punishable under the laws of the United States.
>
> Sonnenberg v. U. S., 264 Fed. 327;
>
> Remus v. U. S., 291 Fed. 513.

In conclusion, it is respectfully submitted that for the errors herein set forth, the judgment of the Honorable Court below, as to each of the plaintiffs in error herein, be reversed.

Respectfully submitted,

WARREN L. WILLIAMS,
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Attorneys for Plaintiffs in Error.

No. 4575.

IN THE

United States
Circuit Court of Appeals,

FOR THE NINTH CIRCUIT.

Herman Landfield and J. W. Oliver,
Plaintiffs in Error,
vs.
The United States of America,
Defendant in Error.

BRIEF OF DEFENDANT IN ERROR.

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BRIEF OF DEFENDANT IN ERROR.

Statement of the Case.

The instant case is brought before this Honorable Court upon a writ of error from the United States District Court for the Southern District of California, Southern Division, by the plaintiffs in error, Herman Landfield and J. W. Oliver, the defendants below, hereinafter referred to as defendants.

An information in five counts was filed in the United States District Court hereinafter mentioned on the 17th day of October, 1924, charging the defendants

with violations of the National Prohibition Act. Counts one and two charged both defendants with unlawful sales of intoxicating liquor on the 28th and 30th days of July, 1924, respectively. The jury found the defendant Herman Landfield guilty as charged in both counts, and the defendant Oliver not guilty as charged in both counts. The court sentenced defendant Landfield to serve six months in the Orange county jail on each count, both sentences to run concurrently with each other and with that imposed on count five, which is hereinafter referred to.

Pursuant to the court's instructions, the court found both defendants not guilty as to the third count and no mention will be made herein as to said count.

Count four charged both defendants with the unlawful possession of three quarts and one pint of intoxicating liquor on or about the 29th day of August, 19...(the proof established the date as August 29, 1924); the jury found both defendants guilty as charged; the court imposed a fine of $1.00 upon each of said defendants on the fourth count.

Count five charged both defendants with maintaining a common nuisance on or about August 29, 1925, with violation of the National Prohibition Act; the jury found both defendants guilty as charged; and the court sentenced the defendant Landfield to one year in the Orange county jail, said sentence to run concurrently with that imposed on the first and second counts, and to pay a fine of $1000.00 and sentenced the defendant Oliver to six months in the Orange county jail on the fifth count.

The defendants assign thirteen specifications of error to the judgment of and proceedings had in the lower court. For the sake of convenience, for the purpose of expediting the consideration of its reply brief and to more clearly present its position, the defendant in error will treat each defendant and his specifications of error separately, and for the reason that most of the specifications of error relate to Landfield, the opening pages of this brief will be devoted to the defendant Landfield and his specifications of error which will be considered in the order in which they appear in his opening brief.

1.

The Verdict of the Jury Finding the Defendant Landfield Guilty as Charged in Counts One, Two, Four and Five of the Information and the Judgment of the Court Thereupon Were According to Law and Supported by the Evidence.

Defendant Landfield contends that each and every finding of the jury as against him was contrary to law and that the evidence was not sufficient to support the jury's verdict.

Each count of the information on which a verdict of guilty was returned against defendant Landfield will be discussed in the chronological order in which it appears in the information, and it is urged at the outset that the verdict of the jury is according to law and amply supported by the evidence.

I. The first count of the information charges the defendant Landfield with the unlawful sale of one bottle of intoxicating liquor to I. H. Corv, for $5.00, on the 28th day of July, 1924.

The said Cory, at the trial, testified that he was a federal prohibition agent; that he visited the Glendale Tavern on the 28th day of July, 1924, in company with his wife and Prohibition Agent Paul Hooke; that upon being seated at a table, he asked for the proprietor and in response to that request the defendant Landfield appeared [Tr. pp. 37-38]; that Landfield asked him what he wanted; that Cory answered, "Well, give us some gin fizzes." He (Landfield) said, "*I* don't serve any mixed up drinks at the table, but *I* will get you the makings." Cory further testified:

"So I went across the dance floor and went into a small room on the left hand side of the dance hall * * * and was gone a couple of minutes, then he came back and beckoned me from the middle of the dance hall. I then got up and walked over to him and he took me into this room. * * * and introduced me to Mr. Ellis. Mr. Ellis said, 'Oh, that is the man that wanted the gin,' and he gave me a White Rock bottle * * * and Mr. Ellis said, 'Here is the gin, here is the way *we* serve it.' I gave Mr. Ellis $5.00 * * *. Landfield did not actually take the money but he was there." [Tr. pp. 39-40.]

Agent Cory, on cross-examination, stated that on the 29th day of August, 1925, upon arresting Landfield, asked him where Ellis was. Landfield replied that he was not *working* there any more. [Tr. p. 51.]

The witness further testified that he drank two drinks out of the bottle; that he knew gin when he tasted it and that it contained more than one-half of one per cent of alcohol by volume. [Tr. p. 41.]

Mrs. Cory testified that she went to the Glendale Tavern on the evening of July 28, 1924, in company with Prohibition Agents Cory and Paul Hooke, and that she saw Landfield there; that Landfield told them *he* could not serve any drinks at the table but it was customary to get the bottle and to serve lemon juice and White Rock water in bottles, and that we could mix our drinks at the table; that he would see that we got a bottle of gin. Mr. Landfield left the table and very soon he came back and motioned to come out. When Mr. Cory returned he had the gin. [Tr. p. 53.]

Landfield took the stand in his defense and testified that he had been in charge of the Tavern for two days prior to July 28, 1924, and that he had not sold any liquor to Cory nor to anyone else. [Tr. pp. 64-69.]

So it is uncontradicted that the defendant Landfield on the 28th day of July, 1924, was the manager and in charge of the Glendale Tavern. He appeared when the proprietor was called and admitted he was in charge. It is contended by counsel that Landfield merely assisted the government agent in making the purchases, but it is respectfully urged that the evidence conclusively shows and was more than ample to justify the jury in finding that Landfield was guilty of making the sale charged in count one of the information.

"A man may, under certain circumstances, do a criminal act through the direct agency of another and the one who stands by and knowingly aids, counsels and abets the doing of a criminal act, becomes liable as principal."

Dukich v. U. S. (C. C. A., 9th Cir.), 296 Fed. 691.

See, also:

Heitler v. U. S. (C. C. A., 7th Cir.), 280 Fed. 703, 705;

Wigington v. U. S. (C. C. A., 4th Cir.), 296 Fed. 125.

There was evidence before the jury that Landfield was the manager of the cafe; that he described the manner in which the establishment served intoxicating drinks; that he would see that the essential ingredients, including gin, were obtained; that in his presence, in an ante-room in the establishment, a man named Ellis (who Landfield admitted worked there) sold the bottle of gin and made the statement, "This is the way *we* serve it." This evidene is more conclusive than that required to convict a defendant of sale done in the Dukich, Heitler and Wigington cases, *supra.*

II. The second count of the information charges the defendant Landfield with having unlawfully sold a bottle of intoxicating liquor on the 30th day of July, 1924, at the Glendale Tavern.

Prohibition Agent Ahlin testified that he was introduced to defendant Landfield at the Glendale Tavern on the 30th day of July, 1924. Upon being seated

with Agent Cory, Mrs. Cory and Agent Hooke at a table in the Glendale Tavern, Landfield was introduced as the proprietor. [Tr. p. 58.]

"Landfield called Mr. Ellis over. Mr. Landfield was present at the conversation between Mr. Ellis and myself. I told Mr. Landfield I wanted Scotch and Landfield said, 'Yes, give it to me.'" [Tr. p. 62.]

A short time after Ellis beckoned to the witness to come over to the little room off the dance floor and there sold him a bottle of Scotch whiskey for $5.00.

The circumstances of this sale are almost identical surrounding the one on the 28th day of July, and it is therefore respectfully submitted that the jury was justified in finding the defendant Landfield guilty of making the sale charged in count two of the information, the facts and circumstances falling within the rule in the Dukich, Heitler and Wigington cases, *supra*.

The fourth count of the information charges the defendant Landfield with the unlawful possession of three quarts and one pint of intoxicating liquor on the 29th day of August, 19...(the proof establishing the date as August 29, 1924). This liquor was seized at the Glendale Tavern. Landfield was present at the time in a managerial or proprietary capacity and had been such since two days before the 28th day of July, 1924. In view of all the facts and circumstances, the manner in which gin had been sold by the establishment on the 28th and 30th days of July, 1924, and the nature of the establishment, it is respectfully submitted that the evidence established beyond a reasonable doubt

that the liquor was unlawfully possessed and that the defendant Landfield knowingly aided and counseled in the unlawful possession thereof and the verdict of the jury in finding the defendant guilty of illegal possession was supported by the evidence.

IV. The defendant Landfield contends that there was not sufficient evidence to warrant the jury in finding him guilty of maintaining a nuisance, but, it will be noted, does not seriously urge this point; counsel merely cites the case of Muncy v. U. S., 289 Fed. 780, in support of said contention, which case is easily and readily distinguished from the case at bar. In the Muncy case, *supra,* the only evidence was one isolated case of the sale of one pint of liquor by a woman of the laboring class, made in her apartment. In the instant case, we have two sales, July 28, 1924, and July 30, 1924, made in a tavern or cafe by the proprietor or manager thereof and on the 29th day of August find the defendant in charge of the premises when a quart of intoxicating liquor was seized on the premises from guests on the place, raising the reasonable and logical inference, in view of the circumstances surrounding the sales to the prohibition agents, that the guests acquired the liquor on the 29th day of August in the same manner as did the prohibition agents on the previous occasions.

It has been recently held that where a defendant owned a building and knew that intoxicating liquor was being illegally kept and sold on the premises, the owner was guilty of maintaining a nuisance. (Dallas

v. U. S. (C. C. A., 8th Cir.), 4 Fed. (2nd) 201.) Here the defendant Landfield, though not the owner, but the manager, not only knew that intoxicating liquor was kept for sale, and sold, but actively engaged in the sale thereof himself. It is earnestly contended and urged that the evidence produced at the trial was ample upon which to base a verdict of guilty of nuisance as to the defendant Landfield.

2.

It is not seriously contended by the Government that the evidence was such to convict the defendant Oliver of possession, but it is urged that there was sufficient evidence to convict him of nuisance. It was shown that he was present on the 28th day of July when a sale of intoxicating liquor was made, and on the 29th day of August when the place was raided, acting in the capacity of a waiter, and that during the month of October, Prohibition Agent Ahlin purchased liquor from the defendant Oliver at the Glendale Tavern.

3.

It is contended in defendant's brief that the court erred in admitting hearsay evidence at the sale of intoxicating liquor on the 30th day of July, 1924, on the ground that the sale was not made in the presence of either of the defendants. It will be remembered that the defendant Oliver was acquitted as to this count, and therefore the contention is only applicable to the defendant Landfield. This evidence was with relation to the second sale on July 30th, 1924. The

prohibition agents on this occasion called for Landfield and asked him to sell them a bottle of Scotch whiskey. Landfield then called Mr. Ellis over and told Ellis to sell it to them. [Tr. p. 62.] The evidence also shows that the man Ellis was employed or working at the Glendale Tavern, as was hereinafter indicated. It is too well established to need citation that the acts of an agent within the scope of his authority are not hearsay as to his principal. However, in the case of West v. U. S. (C. C. A., 9th Cir.), 2 Fed. (2nd) 201-202, a case involving the question of sales of intoxicating liquor, made by an employee outside the presence of the principal or employer, it was held not to be hearsay as to the principal or employer.

4.

Defendants assign as error the introduction of testimony of the sale by Oliver to Agent Ahlin in October, on the ground that it was subsequent to the date named in the information charging the defendants with nuisance. The court admitted the evidence only in support of the nuisance count, and it is respectfully submitted that it is just as reasonable and competent to admit evidence tending to establish a nuisance *after* the time fixed in the information, as it is prior to the time fixed in the information.

Assuming for the sake of argument that this testimony was erroneously admitted (which we do not concede, however), it was not prejudicial to the defendant Landfield, for the reason that he was not connected with the sale and therefore it is not reasonable to in-

dulge in the inference that it was considered by the jury in its deliberations concerning his guilt or innocence, and for the further reason that it was harmless as to him, but for the principal reason that there was sufficient evidence before the jury without this testimony to convince the jury beyond reasonable doubt that he was guilty as charged in counts 1, 2, 5 and 6.

5.

Points 5 and 6 of defendants' brief that the trial court erred in not directing a verdict of not guilty as to both defendants, presents the same question as was presented in points 1 and 2 of defendants' brief and, as has heretofore been proved, points 1 and 2 of defendants' brief were not well taken, points 5 and 6 must also follow.

6.

Defendants assign as error the interrogation of defendant Landfield by the court. It is apparent, from an examination of the questions propounded to defendant Landfield by the court, that he could not possibly be prejudiced thereby, and it is respectfully submitted that the assignment, to say the least, is somewhat visionary.

7.

Defendants assign as error that no proper foundation was laid for the introduction of the following evidence:

I. The bottle of gin purchased on July 28, 1924;

II. The bottle of Scotch whiskey purchased on July 30, 1924;

III. The two bottles of gin and one bottle of Scotch whiskey on August 29, 1924.

Each prohibition agent in testifying as to the contents of the bottle testified that he knew either gin or whiskey when he tasted of it.

> "The statute does not require that the illegal contents of bottles be proved by chemical analysis."
>
> Smith v. U. S. (C. C. A., 4th Cir.), 2 Fed. (2nd) 715-716;
>
> Singer v. U. S. (C. C. A., 3rd Cir.), 278 Fed. 415, 418 (certiorari denied 42 Sup. Ct. 272).

The evidence shows that the test of each bottle was made immediately after the purchase or seizure thereof, and manifestly the issue is whether or not the bottle contained beverages pronounced to be unlawful by the state at the time illegal transactions took place. The evidence that the contents thereof were such as are prohibited by the statute at the time of the transactions is uncontradicted.

The argument of counsel for defendants that it must be shown that the contents of the bottles was in the same condition at the time of the trial that it was at the time of the sale or seizure thereof, is untenable, especially in view of the fact that the liquor was tested immediately upon coming into the hands of the agents. A failure on the part of the Govern-

ment to lay the foundation urged by the counsel for defendants, merely goes to the weight and not to the admissibility of the evidence. Counsel for defendant had the right, but did not avail himself thereof, to examine the witnesses on *voire dire,* and also to cross-examine the witnesses.

It is therefore respectfully submitted that the evidence was properly admitted and the weight to be given such testimony was one for the jury to determine.

8.

Counsel for defendants contend that the trial court erred in permitting witnesses to testify as to what occurred during a raid of the Glendale Tavern, and cite in support thereof excerpts from the testimony of prohibition agent I. H. Cory. Upon reading the entire testimony of agent Cory, concerning this raid, however, it clearly appears that no error was committed by the court. [Tr. pp. 45 to 51.]

9.

The contention of counsel and defendant that there was no proper foundation laid for the introduction of the two bottles of gin and one bottle of whiskey, seized on the 29th day of August, 1924, has heretofore been considered.

10.

The alleged errors assigned to the instructions of the court are without foundation when the entire charge of the court is considered. As to the alleged

error cited in paragraph 12 of defendants' brief, the attention of this honorable court is respectfully directed to page 74 of the transcript, wherein the trial court charged the jury that they were not bound by any expression of the opinion of the court with respect to the facts of the case. This is also true with respect to error alleged in paragraph 13 of defendants' brief.

Considering the instructions of the trial court to the jury as a whole, it is respectfully contended that no prejudicial error was committed.

It is respectfully submitted that the defendants were accorded a fair and impartial trial; that no prejudicial error was committed during the course thereof, and that the verdict of the jury and the judgment of the court were supported by the evidence and were according to law and should be affirmed.

Respectfully submitted,

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(Italics are ours.)

No. 4575.

IN THE

United States

Circuit Court of Appeals,

FOR THE NINTH CIRCUIT.

Herman Landfield and J. W. Oliver,
Plaintiffs in Error,
vs.
The United States of America,
Defendant in Error.

BRIEF OF PLAINTIFFS IN ERROR.

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INDEX TO PRINTED BRIEF OF PLAINTIFFS IN ERROR.

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BRIEF OF PLAINTIFFS IN ERROR.

STATEMENT OF THE CASE.

On or about the 17th day of October, 1924, an information was filed in the District Court of the United States, of in and for the Southern District of California, Southern Division, which information contained five counts charging the plaintiffs in error herein with a violation of the National Prohibition Act.

In count I of said information it was averred that the said plaintiffs in error did, on or about the 28th day of July, 1924, sell for beverage purposes, to one,

I. W. Cory, one bottle of intoxicating liquor at the agreed price of five dollars ($5.00); in the second count of said information, said plaintiffs in error were charged with selling, on or about the 30th day of July, 1924, a bottle of intoxicating liquor to one, C. W. Ahlin, at a price of seven dollars ($7.00); in the third count it was charged that the plaintiffs in error did, on or about the 7th day of August, 1924, sell to one, Paul Hooke, a pint of intoxicating liquor for seven dollars ($7.00); in the fourth count it was charged that the plaintiffs in error did, on or about the 29th day of August, A. D. 19...., have in their possession about three quarts and one pint of intoxicating liquor; in the fifth count it was alleged that the plaintiffs in error did, on or about the 29th day of August, 1924, maintain a common nuisance in Los Angeles, California, where intoxicating liquor was manufactured, kept, sold and bartered for beverage purposes.

To each and every count in said information contained, each of the plaintiffs in error did enter their plea of "Not Guilty."

There was joined, as a defendant, in the court below, with these plaintiffs in error, one, John Doe Ellis, who was not apprehended at the time of the trial of said cause, and which action against said defendant, Ellis, is still pending in said District Court.

That thereafter, trial of the above entitled cause was had, and the jury returned a verdict, finding the plaintiff in error, Herman Landfield, guilty, as charged in the first count of the information, guilty, as charged

in the second count of the information, not guilty, as charged in the third count of the information, guilty, as charged in the fourth count of the information, and guilty, as charged in the fifth count of the information.

The jury found the plaintiff, J. W. Oliver, not guilty as charged in the first count of the information, not guilty, as charged in the second count of the information, not guilty, as charged in the third count of the information, guilty, as charged in the fourth count of the information, and guilty as charged in the fifth count of the information.

A motion for a new trial having been made in behalf of the defendants in the court below upon the usual statutory grounds, and said motion having been denied, the Honorable Court below made its judgment and sentence that the plaintiff in error, Herman Landfield, be imprisoned in the Orange county jail, in the county of Orange, California, for the term and period of six (6) months upon each of the first and second counts, said terms of imprisonment to begin and run concurrently, and that said plaintiff in error, Landfield, be imprisoned in the Orange county jail for the term and period of one (1) year upon the fifth count of the information, to begin and run concurrently with the terms of imprisonment imposed on the first and second counts, and to pay unto the United States of America, a fine in the sum of one thousand dollars ($1,000.00), and stand committed to the said Orange county jail until said fine shall have been paid, and

upon the fourth count said plaintiff in error, Landfield, was adjudged to pay a fine of one dollar ($1.00.)

As to the plaintiff in error, J. W. Oliver, the Honorable Court below ordered and adjudged that he pay a fine of one dollar ($1.00) on the fourth count of the information, and stand committed to the Orange county jail in the county of Orange, California, for the term and period of six (6) months on the fifth count of said information.

In view of the fact that the court instructed the jury to find the plaintiffs in error not guilty upon the third count charged in the information, and that the jury followed the instruction of the court and found both of the plaintiffs in error not guilty of said third count, said count will not be referred to further in this brief.

From the judgments of the court below, these plaintiffs in error prosecute this writ of error, and assign as grounds for a reversal of said judgments, the matter set forth in the specifications of error.

Specifications of Error.

Plaintiffs in error rely upon the following specifications of error in the prosecution of this writ of error, to-wit:

(1) The verdict of the jury finding the plaintiff in error, J. W. Oliver, guilty of counts four and five of the information, and the judgment and sentence of the court predicated thereon, is against the evidence, and consequently against the law, in that there was

not sufficient legal evidence to establish the guilt of said plaintiff in error of the offenses thereby charged.

(2) The verdict of the jury finding the plaintiff in error, Herman Landfield, guilty of counts first, second, fourth and fifth in said information contained, and the judgment and sentence of the court thereupon, is against the law and the evidence in that the evidence produced by the defendant in error was insufficient to prove the allegations contained in said counts aforesaid in said information.

(3) The court erred in admitting incompetent evidence to the prejudice of plaintiffs in error in that the court permitted, over objection of plaintiffs in error, a witness of and for defendant in error, to testify that he had purchased a bottle of Scotch whiskey from one, Ellis, one of the defendants below, same being without the presence of plaintiffs in error.

(4) The court erred in admitting incompetent evidence to the prejudice of plaintiffs in error, in that the court permitted the witness, Ahlin, a witness of and for defendant in error over objection of plaintiffs in error, to testify that he had purchased liquor from plaintiff in error, Oliver, in October, 1924, which was immaterial and incompetent and irrelevant, being at a time subsequent in point of time to the time of the offenses charged in the informaton, to-wit: On or about August 29th, 1924.

(5) The trial court erred in refusing to direct a verdict of not guilty upon each count of the information as to the plaintiffs in error, Herman Landfield and

J. W. Oliver, at the close of the evidence, upon the ground that the charges contained in the information had not been proven against either of the plaintiffs in error herein.

(6) The trial court erred in refusing to direct a verdict of not guilty as to the plaintiff in error, J. W. Oliver, upon each count in the information contained upon the close of the government's evidence, in that the allegations contained in the information, as to said plaintiff in error, had not been proven.

(7) The trial court erred in itself interrogating the plaintiff in error, Herman Landfield, and over the objections of the plaintiffs in error, directing certain questions to said plaintiff in error, which said questions were improper and argumentative and called for a conclusion of the witness, and were prejudicial to the plaintiffs in error in that the court, by said questions, placed the said plaintiff in error, Landfield, in such a position that to answer the said questions, the said Landfield was compelled to accuse the government agents of having committed a deliberate falsehood.

(8) That the court erred in admitting incompetent evidence to the prejudice of these plaintiffs in error in that the court permitted certain exhibits to be introduced at the trial hereof without any sufficient evidence having been laid for the admission of said testimony.

(9) That the trial court erred in admitting incompetent and immaterial evidence to be introduced to the prejudice of plaintiffs in error, to-wit: That the

court permitted the witness for the defendant in error to testify to a certain raid occurring at the place of plaintiff's in error, and as to what occurred there, and as to the conclusion of the witnesses for the government as to certain matters happening thereat.

(10) That the trial court erred in admitting incompetent evidence to the prejudice of plaintiffs in error, to-wit: In that the court permitted, over the objections of plaintiffs in error, the government to introduce into evidence Government's Exhibit No. III, said exhibit being immaterial and no proper foundation having been laid therefor.

(11) That the trial court erred in its charge to the jury, to the prejudice of these plaintiffs in error, in that the court instructed the jury, contrary to the law as follows:

"When, however, weighing all of the evidence, you have an abiding conviction and belief that the defendant is guilty, it is your duty to convict, and no sympathy, sympathy for him or for his family, if he have one, or for his plight, or anything of that sort, justifies you in seeking for doubts by any strained or unreasonable construction or interpretation of the law or evidence or facts."

(12) That the trial court erred in its charge to the jury, to the prejudice of the defendants, in giving the following instruction, to-wit:

"Now, so much, gentlemen, as to the law involved in the case, just a word or two as to the facts: These defendants are charged in three counts with having

sold liquor, and one count with having possession of liquor, and in the remaining count of having maintained a nuisance. Now, it is true as to the third count, as I remember the evidence, there is not any evidence of a sale of liquor under and pursuant to the terms of that count, so, as to that count, I think it is your plain duty to return a verdict of not guilty. There is no evidence as to the matters charged in that count. Now, there is evidence in the case—the weight or the sufficiency of which it is for you, of course—as to the other remaining counts, and it is your duty to determine the guilt or innocence of the defendants in respect to them also. Now, if you believe the testimony of the government agents who went out to this place, as they say, and, as they say, made purchases of liquor there at that place, and that the defendant Landfield, who was apparently in charge in some capacity, aiding, abetting and cooperating and making it possible for the liquor to be purchased, if you believe that, and believe it beyond a reasonable doubt, that it is a fact, why, of course, he is just as responsible as if he himself had produced the liquor and sold the liquor and taken the money, carried the liquor and did everything about it; and if the defendant, Oliver, as testified by some of the witnesses, co-operated, collaborated with that and knew what was going on, and contributed to it, aided and abetted in so far as he did, why, he would be guilty, of course, of the thing with respect to which he did co-operate and collaborate, remembering, of course, that the guilt of a person has to be determined by what that person does and not by what some other person does or says."

(13) That the trial court erred in its charge to the jury, in that it gave to the jury the following instruc-

tion which is not a correct statement of the law, to-wit:

"There has been some slight suggestion—I say slight suggestion, it was rather lengthily elaborated upon, to the effect that you don't know whether the stuff in these bottles contains more than one-half of one per cent of alcohol by volume. I think it hardly worth the time of the court to elaborate upon that. It could easily be true that somebody might have difficulty in saying what near beer or beer or some other similar substance might or might not contain one-half of one per cent or more of alcohol, or thereabouts, but it would hardly seem that anybody with any experience at all, anybody that was not born day before yesterday, could not tell what gin and whisky is. That is what the testimony is, that gin and whisky was purchased. So, gentlemen, don't let your minds be diverted by any unsubstantial, specious argument like that. It is for you to say what the facts are, what the proof is, and you cannot convict the defendants if you do not believe they sold these things containing more than one-half of one per cent of alcohol. If they did sell it, it would be hardly reasonable to conclude that they were selling something that contained less than one-half of one per cent of alcohol; it would hardly be reasonable to believe that an article of that kind was sold for $5.00 and $7.00 a bottle, if you find it was sold for that, so the whole thing, after you simmer it down, depends upon whether you believe these officers or agents or the defendants. The defendant Landfield says that the officers—the testimony given by the officers was an out and out falsehood, plain perjury. That is the case if his story is to be accepted that he didn't know of the sales being

made and didn't participate in the sales. Then these officers have come here and deliberately perjured themselves, because there cannot be any question under the circumstances but that they went there on these occasions and that they there met and talked with the defendant. No doubt about that. It is hardly a case of mistaken identity or mistaken location. So it is just a question of what you are going to conclude. Are you going to conclude that these officers have come here and deliberately perjured themselves, or are you going to conclude that the defendant, for the purpose of removing the consequences of his own wrong doing, if he did do wrong, has testified falsely in order to escape the consequences. Both of them cannot be telling the truth. You have to determine one way or the other as to where the truth lies. You have to come to a conclusion that will be fair under all of the circumstances, free from passion, free from prejudice, giving the thing the calm, deliberate, careful and close consideration that it requires at your hands, and that it is your duty to give it, remembering that if you have a reasonable doubt of the guilt of the defendants, of course you should acquit them, but if you believe beyond a reasonable doubt that they have conducted themselves as alleged, either of them, it is your plain duty to convict them. Any exceptions to the charge?"

I.

The Verdict of the Jury Finding the Plaintiff in Error, J. W. Oliver, Guilty of Counts Four and Five of the Information, and the Judgment and Sentence of the Court Predicated Thereon, Is Against the Evidence, and Consequently Against the Law, in That There Was Not Sufficient Legal Evidence to Establish the Guilt of Said Plaintiff in Error of the Offenses Thereby Charged.

It will be noted that the counts upon which the plaintiff in error, Oliver, was convicted and sentenced was for having possession of intoxicating liquor on or about the 29th day of August, A. D. ....., and for maintaining a common nuisance on or about the 29th day of August, 1924, at Los Angeles, county of Los Angeles, state of California. It will be noted from the bill of exceptions, which was stipulated to contain a statement of the evidence adduced at said trial, that the plaintiff in error, Oliver, raised the question of the sufficiency of the evidence by a motion for an instructed verdict at the close of the government's case. [Tr. of Record, pp. 63 and 64.]

And also for an instructed verdict at the close of all the evidence in the case. [Tr. of Record, p. 70.] To which ruling upon said motion the plaintiffs in error, then and there duly excepted.

The government's case was presented by three witnesses, to-wit: Mr. I. H. Cory, Mrs. Minnie E. Cory and Mr. C. W. Ahlin. With the exception of Mrs.

Minnie E. Cory, the other two witnesses were prohibition officers. The testimony of all these witnesses, and for the purposes of this argument, the truth of all their testimony will be assumed, and viewed in a most favorable light to the government, as far as the plaintiff in error, Oliver, is concerned, is as follows: The witness Cory testified:

"I arrested Mr. Landfield and Mr. Oliver and this George Cook, who had given me the O. K. card from the first place, and who at that time was acting as a waiter for Mr. Landfield." [Tr. of Record, p. 46.]

"I did not know who the waiter was who brought the lemon juice and cracked ice; I looked for him the night I made the raid and could not find him, a large man, I should judge 5 feet 11. He is not a party to this case." [Tr. of Record, p. 49.]

"The three bottles, government's Exhibit No. 2, were not taken from the defendant, but they were taken from the table at that time." [Tr. of Record, p. 50.]

"I arrested a man by the name of Cook and the Oliver and Landfield." [Tr. of Record, p. 51.]

"These three bottles I had never seen in the possession of the defendant, Landfield, I took them from guests in the place." [Tr. of Record, p. 52.]

The foregoing testimony was the only testimony given by the witness, I. H. Cory, relative to the plaintiff in error, Oliver.

Mrs. Minnie E. Cory, called as a witness in behalf of the defendant in error, testified as follows:

"That she was at the Glendale Tavern on the 28th day of July, 1924, with Mr. Cory and Mr. Hooke;

that she saw the defendant, Herman Landfield, at that time, but not the defendant, J. W. Oliver." [Tr. of Record, p. 53.]

Q. Did you at any time see Mr. Oliver on your visits?

A. I did not. [Tr. of Record, pp. 55 and 56.]

On cross-examination, the witness testified as follows:

"That they inquired as to where Mr. Landfield was from the waiter, but that she could not see if this man was the defendant below, Oliver." [Tr. of Record, p. 56.]

The witness Ahlin testified:

"That on the night of the 30th day of July, 1924, he saw the plaintiffs in error, Landfield and Oliver, at the Glendale Tavern, and that the defendant, Oliver, served *soft drinks* at the table." (Italics are ours.) [Tr. of Record, p. 58.]

The only evidence which in any way would tend to connect Mr. Oliver with any offense against the United States Government is found in the testimony of Agent Ahlin, when he testified, over the objections of the plaintiff in error, that he was out at the Glendale Tavern some time in October and purchased liquor from the plaintiff in error, Oliver. This testimony was objected to by the plaintiffs in error upon the grounds that neither the plaintiff in error, Oliver, or the plaintiff in error, Landfield, were charged with any offense committed in October; that the date of their asserted offense was set forth as the 29th day of August, 1924, in the information, and that the

evidence as to the October offense was too far removed, too remote and incompetent.

The admission of this evidence has been assigned by the plaintiffs in error herein as one of their specifications of error, and since the same will be discussed separately, it is not our intention to burden the court with repetition.

The court will note that the defendant, Oliver, was found guilty, not of selling liquor, but of possession of liquor, and of maintaining a nuisance. We submit that there is absolutely no evidence in the record tending to show even remotely that the said Oliver was guilty of having possession of any alcoholic liquor whatsoever, or of in any manner operating or maintaining or having anything to do with any nuisance whatsoever.

The word *Possess* is defined by Webster: "To have or hold—as property." It has been held to mean the actual control, care and management as distinguished from ownership. (Citing cases from various state jurisdictions.)

(McFadden on Prohibition, page 317.)

While possession may be constructive as well as actual, there is no evidence tending to connect the plaintiff in error, Oliver, either actually or constructively, with having liquor in his possession.

It is true that the court permitted certain evidence to be given of an alleged sale by the plaintiff in error, Oliver, on or about the month of October, 1924, the admission of which testimony it is contended, consti-

tutes error; but said alleged sale is separate from the possession of intoxicating liquor in that the amounts of said liquor and the dates thereof between the sale count and the possession count were far removed. And if this were not the case, it has been held specifically that the offense of unlawful possession of liquor is a crime separate and direct from the crime of the sale of liquor, and is generally conceded by all the authorities.

In commenting on an instruction in the case of Feinberg v. U. S., 2 Fed. Rep. (2nd Series) 955, the court said:

> "Proof of the mere knowledge of the presence of the liquor or of the handling of it as an employee, or of both these facts, did not necessarily show either possession or unlawful possession by the employee."

As far as the count for unlawful possession is concerned, relative to the plaintiff in error, Oliver, the defendant in error is in no better position.

Courts have held specfically that the offense of unlawfully possession liquor is a distinct offense from that of maintaining a nuisance for unlawful selling of liquor.

Massey v. U. S. (C. C. A.), 281 Fed. 293;
Page v. U. S. (C. C. A.), 278 Fed. 41;
Bell v. U. S. (C. C. A.), 285 Fed. 145;
Singer v. U. S. (C. C. A.), 288 Fed. 695.

It is true that this Honorable Court has held that under certain circumstances, proof of one sale of al-

coholic liquors might tend to establish the maintenance of a nuisance, but the circumstances must be such as to show that a resort or a place where liquor is kept for sale, barter or other commercial purpose is being maintained. Or to state the rule in the language of the courts,

> "The test of a statutory nuisance, therefore, is not the number of sales or the length of time liquor is kept upon the premises, but whether the place is maintained for the keeping and sale of liquor in the sense of the statute."
>
> Singer v. U. S. (C. C. A.), 288 Fed. 695.

Upon the question of what constitutes a nuisance, a majority of the courts hold that a single sale or a single act in violation of the National Prohibition Act, does not constitute the offense of maintaining a nuisance, and the reasoning of some of the decisions is to the effect that by the use of the words "sold," "kept" or "bartered," there was meant either habitually or continuously or concurrently so sold, kept or bartered, and that the word "maintenance" implies continuation or some degree of permanency.

Reynolds v. U. S., 282 Fed. 257;
Hattner v. U. S., 293 Fed. 387.

However, there is nothing inconsistent in the holding of these cases with the holding of this Honorable Court since continuity of wrong doing may appear from, or be implied from the nature and circumstances of a single sale, or other transaction.

In view of the evidence hereinbefore presented, and in view of the further fact that the only proof ad-

duced in the case was to the effect that the plaintiff in error, Oliver, was only a waiter at the premises in question, was not shown to have any proprietory, managerial, supervisory or directory connection with the premises in question, or any control of any liquors therein, the evidence is insufficient, even assuming the competency and relevancy of all the evidence in the record, to sustain a conviction of the counts upon which said plaintiff in error was convicted.

II.

The Verdict of the Jury Finding the Plaintiff in Error, Herman Landfield, Guilty of Counts First, Second, Fourth and Fifth in Said Information Contained, and the Judgment and Sentence of the Court Thereupon, Is Against the Law and the Evidence in That the Evidence Produced by the Defendant in Error Was Insufficient to Prove the Allegations Contained in Said Counts Aforesaid in Said Information.

The defendant below, Herman Landfield, was found guilty in the first count of a sale to the witness, Cory, in the second count, of a sale to the witness, Ahlin, upon the fourth count of possession, and upon the fifth count of maintaining a nuisance.

As we stated in the preceding specification of error, as far as the possession charge was concerned, the evidence shows that the liquor introduced in evidence as Exhibit No. 3 of defendant in error, was taken from guests sitting at the tables of the restaurant,

which plaintiff in error was then managing. The testimony upon this point is as follows:

"The third time we went there was, I believe, on the 28th of August. I went there with a raiding crew." [Tr. of Record, p. 45.]

"During it all, we succeeded in getting from the tables, or thereabouts, three bottles, two bottles of gin, and one bottle containing Scotch whiskey, about one-half full. * * * Mr. Landfield said, 'Well, I'm not responsible for this stuff in my place.' He said the guests brought it in and he didn't see how he could keep them out. * * * These three bottles were found in the premises at the time of the raid on the 28th day of August, it says here. The three bottles, government's Exhibit No. 2, were not taken from the defendant, but they were taken from the table at that time. * * * These three bottles I had never seen in the possession of the defendant, Landfield. I took them from guests in the place. [Tr. of Record, pp. 45, 46, 49, 50 and 51.]

The witness testified further, that he never obtained any liquor directly from either of the plaintiffs in error. The three bottles seized on this raid were introduced as government's Exhibit No. 3, and the jury convicted the defendant below, Landfield, upon the count charging possession of said bottles of liquor. Consequently there is no proof to show this defendant guilty of possession of said intoxicants.

Relative to the sale to Mr. Cory of a bottle of intoxicating liquor, the testimony is that the witness, Cory, engaged Mr. Landfield in a conversation relative to prize fighting, and then after that Mr. Land-

field told him that he did not serve any mixed up drinks or straight drinks at the table, but that he would get him the makings. That Mr. Landfield then introduced him to Mr. Ellis, and that the witness gave Mr. Ellis $5.00 for the bottle. That Landfield did not actually take the money, but that he was there, and that he, Mr. Cory, came in upon a later occasion and introduced Mr. Ahlin to Mr. Landfield. [Tr. of Record, pp. 40-42.]

Mrs. Minnie E. Cory, the government's witness, testified as follows:

"That Mr. Landfield said he could not serve them any drinks at the table." [Tr. of Record, p. 53.]

"Q. Were you there on any other occasion?

A. No, sir.

Q. Did you at any time see Mr. Oliver on your visits?

A. I did not." [Tr. of Record, pp. 55 and 56.]

"Mr. Landfield said that he would see that we got a bottle of gin."

While it is true that the credibility of the testimony of witnesses is for the jury, it might be herein noticed that according to the witness, Cory, "Ellis is 5 feet, 6 or 7, not so very tall, dark complexion, black eyes, weighing, I should judged, about 175 or 180 pounds." [Tr. of Record, p. 52.]

Minnie E. Cory, another witness for the government, testified, "I have seen Mr. Ellis, and I saw him before the 28th day of July, 1924. He is a man probably 5

feet 10, slender, light complected, or light hair. [Tr. of Record, p. 56.]

The witness, Ahlin, testified that he was introduced to Mr. Landfield by Mr. Cory; that Mr. Ellis came to the table and that the witness was introduced to him. That Mr. Ellis beckoned to him to come over to the little room off the dance room and delivered a bottle of the liquor. The liquor was bought out there at the Glendale Tavern from Mr. Ellis. "The defendant, Landfield, was in the premises some place when I bought it. He was not in my immediate presence when I purchased the liquor from Mr. Ellis. I was in the room by myself with Mr. Ellis." [Tr. of Record, pp. 58 and 59.]

It is respectfully submitted to this Honorable Court that the evidence shows nothing further than the defendant below, Landfield, merely assisted the government's witness to purchase liquor, and that there is no testimony whatsoever in the record tending to show that said defendant below, Landfield, profited in any way whatsoever in the said transactions, or received any money or that there was any relationship between him and the so-called defendant, Ellis, to sell liquor.

A purchaser of liquor is not criminally liable, as the National Prohibition Law is against the sale of liquor and not against the purchase of liquor, and a person who assists the purchaser is not liable.

(McFadden on Prohibition, p. 294.)

Referring once more to the nuisance count upon which this defendant was convicted, we desire to draw

the court's attention to the case of Muncy v. U. S., 289 Fed. 780, where the court said:

> "The only question, therefore, which we have to determine, is whether the evidence of the sale of the pint of liquor, as mentioned, justifies a verdict of guilty of maintaining a nuisance under the terms of the act. As has been already stated, no liquor was found on defendant's person or on premises under her exclusive control. Except as to the pint which the officer claims to have purchased from her, there was no evidence either of sale or possession. It is true the officer claims to have been told by the boy who guided them to the defendant's apartment that he had gotten whiskey from her; but the statement was not made in her presence, and was afterwards denied by the boy when he became a witness in the trial. The defendant conducted a laundry in her apartment and was engaged in that work when arrested, and there is, as far as the record before us shows, an entire absence either of facts or inferences from which we may say that the storage or sale of the whisky was one of the ordinary or usual incidents to the business conducted by the defendant or on her premises. The case made was the case of a single sale—the premises the ordinary home of a woman of the laboring class—and this, we believe, without more, is not enough."

III.

The Court Erred in Admitting Incompetent Evidenc to the Prejudice of Plaintiffs in Error in That the Court Permitted, Over Objection of Plaintiffs in Error, a Witness of and for Defendant in Error, to Testify That He Had Purchased a Bottle of Scotch Whiskey From One, Ellis, One of the Defendants Below, Same Being Without the Presence of Plaintiffs in Error.

The said evidence objected to is as follows:

Q. I will ask you if you have ever seen this bottle before (handing bottle to witness),

A. I have. [Tr. of Record, p. 58.]

Q. Where?

A. It was bought out there at the Glendale Tavern from Mr. Ellis.

Q. Is that the bottle you bought from Mr. Ellis?

A. It is.

Q. Where was the defendant Landfield when you bought that?

A. In the premises some place.

Q. Was he in your immediate presence when you purchased this from Mr. Ellis?

A. I was in the room by myself with Mr. Ellis.

Mr. Williams: I move that all of that testimony be stricken out on behalf of the defendants Landfield and Oliver.

The Court: Denied.

Mr. McGann: Q. Did you examine the contents of that bottle at that time?

A. We did.

Q. What did you ascertain the contents of that bottle to be?

A. Scotch whisky.

Mr. Williams: We object to that as immaterial and no foundation laid.

The Court: Do you know Scotch whisky when you taste it?

A. Yes, sir.

Q. Did you taste this?

A. Yes, sir. [Tr. of Record, p. 59.]

Q. Was that Scotch whisky?

A. Yes, sir.

Q. It was?

A. Yes, sir.

Mr. Williams: I move that that be stricken out as calling for the conclusion of the witness and no foundation laid.

The Court: Denied.

Mr. Williams: Exception. [Tr. of Record, p. 60.]

It is submitted that this evidence is hearsay evidence, occurring without the presence of plaintiff in error, and should have been excluded by the court.

IV.

The Court Erred in Admitting Incompetent Evidence to the Prejudice of Plaintiffs in Error, in That the Court Permitted the Witness, Ahlin, a Witness of and for Defendant in Error Over Objection of Plaintiffs in Error, to Testify That He Had Purchased Liquor From Plaintiff in Error, Oliver, in October, 1924, Which Was Immaterial and Incompetent and Irrelevant, Being at a Time Subsequent in Point of Time to the Time of the Offenses Charged in the Information, To-wit. On or About August 29th, 1924.

The said evidence objected to is as follows:

"Mr. McGann: Q. Were you at that address at any other time?

A. I was out there at a later date.

Q. What date?

A. Around in October sometime.

Q. What was the occasion of your visit?

Mr. Williams: We object to any October visit on the ground that it is immaterial, and not within the time charged in this information.

The Court: Denied.

Mr. Williams: The last date mentioned was October.

The Court: They are charged with maintaining a nuisance on or about the 29th day of August, and any time either before or after that, within a reasonable degree, would be relevant.

Mr. Williams: We renew our objection to the October visit on the ground that it is too far removed, too remote, and incompetent.

The Court: Overruled. [Tr. of Record, p. 60.]

Mr. Williams: Exception.

Mr. McGann: Q. What was the purpose of your visit?

A. With Agent Bybee we visited these premises again and we then purchased liquor. This liquor was purchased by me of Oliver in the presence of Mickey Murphy, who was the main proprietor of the place at that time.

Mr. Williams: I move that that all be stricken out as immaterial to the issues contained in this indictment.

The Court: Denied.

Mr. Williams: Exception.

Mr. McGann: Q. What date was that, if you know?

A. I don't just recall the date; I haven't got my records with me.

Q. Now, were you there at any other time other than the two times you have mentioned?

A. No, sir.

Q. I take it you were not present at the time of the raid?

A. I was not.

Mr. McGann: Take the witness." [Tr. of Record, p. 60.]

It will be noted that this testimony could not have been admissible against the defendant, Landfield, because the witness himself stated that he purchased the liquor of Oliver in the presence of Mickey Murphy, who was then the proprietor of the place, and that there was no evidence in the record that the defendant,

Landfield, was in the place or in the state of California in October, 1924. The sale in October, 1924, was not alleged in the information. The last date mentioned in the information was on or about the 29th day of August, 1924, and in view of the testimony hereinbefore set forth, it may easily be seen how prejudicial this testimony was to the defendants below.

Seasonable objection was made to the admission of said testimony. It did not in any way tend to prove or disprove the issues of the case, was unfair to the defendants below in that they were not apprised of the prosecution's intention to use the said testimony, and consequently could not anticipate it, and therefore could not prepare against it. It is the only testimony in the record tending in any way to involve the defendant below, Oliver, and said testimony does not in any way connect the defendant below, Landfield, with said sale. The general proposition of law upon the point, we believe to be, that

Evidence of sales at times other than those covered by the information should not be received in evidence, as the question of intent is not material in this class of cases.

Hall v. U. S., 150 U. S. 76;
Hurwitz v. U. S., 299 Fed. 449;
Garb v. U. S., 294 Fed. 66;
Carpenter v. U. S., 280 Fed. 598;
Paris v. U. S., 260 Fed. 529;
Beyer v. U. S., 282 Fed. 225.

The court evidently admitted said testimony upon the ground that it might tend to prove or disprove the nuisance, but the nuisance count upon which both of the defendants below, plaintiffs in error herein, were convicted, alleges the nuisance as of date on or about August 29, 1924, and we submit this testimony is too remote to be admissible thereupon.

V.

The Trial Court Erred in Refusing to Direct a Verdict of Not Guilty Upon Each Count of the Information as to the Plaintiffs in Error, Herman Landfield and J. W. Oliver, at the Close of the Evidence, Upon the Ground That the Charges Contained in the Information Had Not Been Proven Against Either of the Plaintiffs in Error Herein.

VI.

The Trial Court Erred in Refusing to Direct a Verdict of Not Guilty as to the Plaintiff in Error, J. W. Oliver, Upon Each Count in the Information Contained Upon the Close of the Government's Evidence, in That the Allegations Contained in the Information, as to Said Plaintiff in Error, Had Not Been Proven.

These specifications of error will be considered together as they cover the same proposition of the law. The proceedings had under specification V are as follows:

"Mr. Williams: At this time, in compliance with the practice of this court, I desire at this time to move, on behalf of the defendant, J. W. Oliver, as to count 1 of this information, that the jury be instructed to acquit the defendant, J. W. Oliver, on the ground—

The Court: The motion will be denied, and it may be considered as having been made on behalf of each of the defendants as to each count of the indictment, and denied.

Mr. Williams: I would like to make my motion, if the court please.

The Court: I said it might be considered as made to all defendants on all counts, and denied.

Mr. Williams: I desire to move also as to count 2—

The Court: I said it might be considered as having been made with respect to each defendant and as to each count, and denied.

Mr. Williams: That includes counts 3, count 4 and count 5?

The Court: Yes, and denied. Proceed.

Mr. Williams: Now, on behalf of the defendant, Herman Landfield, I desire to move this court that the jury be instructed—

The Court: It has been suggested, Mr. Williams, that—

Mr. Williams: Wait a minute, if the court please; I haven't made my motion.

The Court: I said it might be considered as to each defendant and each count, and the motion denied.

Mr. Williams: I should like the court to know there are five counts.

The Court: I know there are five counts, and it may be considered as made to five counts by each defendant, and denied.

Mr. Williams: For the purpose of the record—

The Court: So now that ought to be understood, proceed.

Mr. Williams: Very well. Mr. Landfield take the stand, please." [Tr. of Record, pp. 63 and 64.]

Upon the proceedings had relative to specification VI, they are as follows:

"Mr. Williams: The defendants rest, with this exception: I desire at this time to renew my motions.

The Court: Denied.

Mr. Williams: Just a moment. I haven't made my motions.

The Court: It may be considered as having been made and denied.

Mr. Williams: For the purpose of the record I desire to make the motion on behalf of defendants Landfield and Oliver.

The Court: It may be considered as having been made to each defendant on each count, the motion to dismiss on each count, and it is denied. Proceed.

Mr. Williams: I desire to make my motion, if the court please.

The Court: It may be regarded as having been made to each count and as to each defendant, and denied.

Mr. Williams: Exception. On count 3 there is no testimony to substantiate that count, and I move that that be dismissed.

The Court: Denied.

Mr. Williams: I don't want to have any argument.

The Court: Any rebuttal?

Mr. McGann: No rebuttal." [Tr. of Record, p. 70.]

Since the points covered by these specifications have been discussed in specifications of error I and II, we will not take up the time of the court further on these points.

VII.

The Trial Court Erred in Itself Interrogating the Plaintiff in Error, Herman Landfield, and Over the Objections of the Plaintiffs in Error, Directing Certain Questions to Said Plaintiff in Error, Which Said Questions Were Improper and Argumentative and Called for a Conclusion of the Witness, and Were Prejudicial to the Plaintiffs in Error in That the Court, by Said Questions, Placed the Said Plaintiff in Error, Landfield, in Such a Position That to Answer the Said Questions, the Said Landfield Was Compelled to Accuse the Government Agents of Having Committed a Deliberate Falsehood.

The proceedings as they are material to this specification of error, are as follows:

"The Court: Q. Where is this place in Glendale?

A. 1120 South San Fernando boulevard.

Q. Inside of the City of Glendale?

A. Yes, sir.

Q. All of these statements these witnesses have made that they bought liquor there at your place from you or through you is all false?

A. Absolutely, Your Honor.

Q. They have just come here and told a deliberate falsehood?

Mr. Williams: We will have to object to that question, Your Honor, on the ground it is argumentative.

The Court: Overruled.

Mr. Williams: Exception.

The Court: Q. That is a fact, is it not?

A. Yes, sir." [Tr. of Record, p. 68.]

The asking of these questions in such a manner as to compel the defendant to accuse the government's agents of testifying to a deliberate falsehood, these plaintiffs in error assign as error. Since this point will again be discussed in a subsequent specification of error, we will not further discuss it here.

VIII.

That the Court Erred in Admitting Incompetent Evidence to the Prejudice of These Plaintiffs in Error in That the Court Permitted Certain Exhibits to Be Introduced at the Trial Hereof Without Any Sufficient Evidence Having Been Laid for the Admission of Said Testimony.

Since the argument is more or less similar upon the inadmissibility into evidence of these exhibits which were introduced separately, they will be considered together. We will consider the testimony relative to the admission of these exhibits as follows:

"Mr. McGann: Q. Where did you first see that bottle, Mr. Cory?

A. I first saw that bottle when Mr. Ellis handed it to me in the small room in the Glendale Tavern in the presence of Mr. Landfield. I paid him $5.00 for it.

Q. What date was that?

A. It is marked here (indicating) 'Date of buy 7/28/24.' The 28th day of July. 'Paid, $5.50.'

Q. Did you examine the contents of that bottle at the time?

A. I drank two drinks out of it; yes, sir.

Q. What was it?

A. Gin.

Mr. Williams: I object to that as calling for a conclusion of the witness, and no proper foundation laid for the question.

The Court: Do you know gin when you taste it?

A. Yes, sir.

Q. Have you had enough experience to know what it is if you taste it?

Yes, sir.

The Court: Overruled.

Mr. Williams: Exception.

Mr. McGann: I will ask that this be admitted in evidence.

Mr. Williams: I object to it on the ground that there is no proper foundation laid for its introduction.

The Court: In what way is there no proper foundation laid?

Mr. Williams: No foundation laid in this: That the witness had not been properly qualified to testify as to what the contents of this bottle is.

The Court: It is a matter of common knowledge what gin contains. Did it contain more than one-half of one per cent of alcohol by volume?

A. It did.

Mr. Williams: I object to that on the ground that the witness is not qualified to testify to that.

The Court: Overruled.

Mr. Williams: Exception.

The Court: All right. Go on." [Tr. of Record, pp. 40, 41 and 42.]

"Mr. McGann: Q. I will ask you to examine this bottle, Mr. Cory.

A. Yes, sir.

Q. Where did you first see that bottle?

A. I saw that bottle first when it came onto the table—rather, when Agent Ahlin took it out of his pocket in the Glendale Tavern.

Q. Did you examine the contents at that time?

A. I had a drink out of it, possibly two.

Q. What would you say the contents of the bottle was?

Mr. Williams: I object to that as immaterial, calling for a conclusion of the witness, and no proper foundation laid.

The Court: Overruled.

Mr. Williams: Exception.

A. I would say that it is Scotch Whisky.

The Court: Do you know Scotch whisky when you taste it?

A. Yes, sir.

Mr. Williams: We object to his statemnt that he knows Scotch whisky when he tastes it, and I renew my objection that the proper foundation has not been laid.

The Court: Some people, I suppose, know it. This witness says he does. Overruled.

Mr. Williams: Exception.

Mr. McGann: I ask at this time to introduce in evidence Government's Exhibit No. 2.

Mr. Williams: The same objection. No proper foundation laid.

The Court: Overruled. In what respect is the foundation insufficient?

Mr. Williams: It has not been shown what the bottle contains. It might be gingerale, from the color of it, for all we know.

The Court: I know, but color is not the only thing that goes into the consideration of what it is. If he said he looked at the color and said it was Scotch whisky, that would be different, but he didn't do that. He said he tasted it. Overruled.

Mr. Williams: Exception.

(Witness continuing) We stayed there a short time, and as soon as possible, got out of the place, and this bottle was taken back by Agent Ahlin and labeled by himself, and it was also sent to the United States chemist in San Francisco." [Tr. of Record, pp. 43, 44 and 45.]

"Mr. McGann: Q. I will ask you to examine these three bottles.

A. These three bottles were found in the premises at the time of the raid on the 28th day of August, it says here (indicating).

Mr. Williams: I move that 'it shows here' be stricken out as hearsay.

The Court: Denied.

Mr. Williams: Exception.

A. It is on the label here (indicating).

Mr. McGann: Q. Now, did you examine the contents of the three bottles at that time?

A. Yes, sir; I did.

Q. What sort of an examination did you make, Mr. Cory?

A. I sat at the table there making the return on the search warrant, and as the agents found the liquor they brought it over to me and I smelled it and tasted it to make sure what it was, and then I gave Mr. Landfield a return on the search warrant for them.

Q. What did you find the contents of these bottles to be?

A. These two bottles, so called 'gin.' This other bottle is Scotch whisky.

Mr. Williams: I move that that answer be stricken out on the ground there is no proper foundation laid, and calling for a conclusion of the witness.

The Court: Overruled.

Mr. Williams: Exception.

Mr. McGann: I ask at this time, if the court please, that the three bottles, the two bottles of gin and the one bottle of Scotch whisky, be accepted in evidence as Government's Exhibit No. 3.

Mr. Williams: I object to their introduction as immaterial, and no proper foundation laid.

The Court: Are you still bothered with the color, or is it something else?

Mr. Williams: The color looks quite natural. It looks like water.

The Court: In what respect is the foundation insufficient.

Mr. Williams: This witness is not qualified.

The Court: You still know gin and whisky, do you?

A. Yes, sir.

Q. When you taste them?

A. Yes, sir.

Q. And you tasted those bottles?

A. Yes, sir.

Q. And it was gin and whisky?

A. Yes, sir.

Mr. Williams: I object to that and move that the answer be strcken out as immaterial, and object to the introduction of the testimony, on the same ground.

The Court: Denied.

Mr. Williams: Exception.

Mr. McGann: Q. You testified that the waiter brought you some lemon juice.

Mr. Williams: Has the Government introduced these three bottles?

Mr. McGann: Yes.

Mr. Williams: Has Your Honor ruled upon their introduction?

The Court: Yes.

Mr. Williams: I desire an exception to that ruling." [Tr. of Record, pp. 47 and 48.]

It is submitted that no sufficient foundation was laid for the introduction into evidence of any of said exhibits.

It is an elementary proposition of law that in order to lay a foundation for the introduction into evidence of an exhibit, four things must be shown. First, that the evidence was taken from the defendants; second, the condition of the article taken when it was taken from the defendants; third, that the exhibit sought to be introduced is still in the same condition as it was when it was taken from the defendants; fourth, that the evidence is what it purports to be.

There is not one scintilla of evidence in the record tending to show what was in the bottles introduced in evidence. No chemist testified as to the contents of the said bottles. It was not shown what the analysis thereof was. There was no evidence in the record whatsoever to show that the contents of the bottles had not been changed during the time they were in the chemist's hands, if they were in his hands during all of

said times. Further, the foundation for the introduction into evidence of said articles was lacking in that there was not sufficent showing as to the experience of the witnesses for the defendant in error as to their knowledge of alcoholic liquors, or that they knew what they were drinking and the chemical contents thereof.

IX.

That the Trial Court Erred in Admitting Incompetent and Immaterial Evidence to Be Introduced to the Prejudice of Plaintiffs in Error, To-wit: That the Court Permitted the Witness for the Defendant in Error to Testify to a Certain Raid Occurring at the Place of Plaintiffs in Error, and as to What Occurred There, and as to the Conclusion of the Witnesses for the Government as to Certain Matters Happening thereat.

The said evidence objected to is as follows:

"The third time I went there was, I believe, on the 28th day of August. I went there with a raiding crew." [Rep. Tr., p. 13, line 14, to p. 18, line 10.]

"Mr. McGann: Q. Who was present at the time of the raid?

A. Agent Glynn, Agent Plunkett, Whittier, Hooke, and Agent Cass from San Diego, and Agent Tyson, of the Los Angeles office. We went there on a search warrant which I had procured on affidavit before United States Commissioner Long, alleging these sales.

Mr. Williams: I move it be stricken out as immaterial and not the best evidence.

The Court: Denied. It is harmless.

Mr. Williams: Exception.

Mr. McGann: Q. Then what did you do?

A. We entered the place, and immediately the place was in an uproar.

Mr. Williams: I move that be stricken out as a conclusion.

The Court: Denied. Harmless.

Mr. Williams: Exception.

A. (Continuing.) And bottles were thrown to the floor and broken, bottles and glasses were thrown around, and one agent was assaulted, Agent Cass, I believe.

Mr. Williams: I move that all of that be stricken out as calling for a conclusion of the witness.

The Court: Denied.

Mr. Williams: Exception.

A. (Continuing.) During it all we succeeded in getting from the tables, or thereabouts, three bottles, two bottles of gin and one bottle containing Scotch whisky, about half full. I arrested Mr. Landfield and Mr. Oliver, and this George Cook, who had given me the o. k. card from the first place, and who at that time was acting as a waiter for Mr. Landfield.

Mr. Williams: I move that that answer be stricken out as immaterial and no foundation laid.

The Court: Denied.

Mr. Williams: Exception.

A. (Continuing.) At that time I took Mr. Landfiend and sat him down in a chair, and he got up and started to run around, and I sat hm down again and told him I didn't want him to get up again or I would put the handcuffs on him, and that he had better be a little quiet. He said, 'Well, I am not responsible for this stuff in my place.' He said, 'The guests brought it in and how am I going to keep them out?'

I said, 'Mr. Landfield, that is your business. If you have liquor that is in the quantity that is in this place, and let your guests bring it in, and you don't stop them, you are responsible, and the Federal Government are going to keep your place clean.'

Mr. Williams: We object to all of that and move that it be stricken out as immaterial." [Tr. of Record, pp. 45 and 46.]

Upon cross-examination, the witness testified as follows:

"During the confusion, Mr. Landfield was running around. I sat Mr. Landfield down and I told him to sit down or I would have to put the handcuffs on him. I told him if he did not sit down that I would knock him down. Everybody in the place seemed to have liquor on the tables or under the tables. *I did not see any liquor on any of the tables; I just judged from general conditions.*" (Italics ours.) [Tr. of Record, p. 51.]

The introduction of which evidence, these plaintiffs in error submit, was highly prejudicial to them.

X.

That the Trial Court Erred in Admitting Incompetent Evidence to the Prejudice of Plaintiffs in Error, To-wit: In That the Court Permitted, Over the Objections of Plaintiffs in Error, the Government to Introduce Into Evidence Government's Exhibit No. III, Said Exhibit Being Immaterial and No Proper Foundation Having Been Laid Therefor.

The proceedings relative to this specification of error have been hereinbefore set forth, and the argument

thereupon is similar to that set forth in support of plaintiffs' specification of error number VIII.

XI.

That the Trial Court Erred in Its Charge to the Jury, to the Prejudice of These Plaintiffs in Error, in That the Court Instructed the Jury, Contrary to the Law as Follows:

"When, however, weighing all of the evidence, you have an abiding conviction and belief that the defendant is guilty, it is your duty to convict, and no sympathy, sympathy for him or for his family, if he have one, or for his plight, or anything of that sort, justifies you in seeking for doubts by any strained or unreasonable construction or interpretation of the law or evidence or facts." [Tr. of Record, p. 80.]

By said instruction, the jury was told that if they had "an abiding conviction and belief that the defendant is guilty" it was their duty to convict, we submit is a misstatement of the law in view of the fact that said abiding conviction and belief must be beyond a reasonable doubt.

XII.

That the Trial Court Erred in Its Charge to the Jury, to the Prejudice of the Defendants in Giving the Following Instruction, To-wit:

"Now, so much, gentlemen, as to the law involved in the case, just a word or two as to the facts: These defendants are charged in three counts with having sold liquor, and one count with having possession of

liquor, and in the remaining count of having maintained a nuisance. Now, it is true as to the third count, as I remember the evidence, there is not any evidence of a sale of liquor under and pursuant to the terms of that count, so, as to that count, I think it is your plain duty to return a verdict of not guilty. There is no evidence as to the matters charged in that count. Now, there is evidence in the case—the weight or the sufficiency of which it is for you, of course—as to the other remaining counts, and it is your duty to determine the guilt or innocence of the defendants in respect to them also. Now, if you believe the testimony of the Government agents who went out to this place, as they say, and, as they say, made purchases of liquor there at that place, and that the defendant Landfield, who was apparently in charge in some capacity, aiding, abetting and co-operating and making it possible for the liquor to be purchased, if you believe that, and believe it beyond a reasonable doubt, that it is a fact, why, of course, he is just as responsible as if he himself had produced the liquor and sold the liquor and taken the money, carried the liquor and did everything about it; and if the defendant, Oliver, as testified by some of the witnesses, co-operated, collaborated with that and knew what was going on, and contributed to it, aided and abetted in so far as he did, why, he would be guilty, of course, of the thing with respect to which he did co-operate and collaborate, remembering, of course, that the guilt of a person has to be determined by what that person does and not by what some other person does or says." [Tr. of Record, pp. 82 and 83.]

By said instruction, the jury was told, "Now, there is evidence in the case—the weight or the sufficiency

of which it is for you, of course—as to the other remaining counts, and it is your duty to determine the guilt or innocence of the defendants in respect to them also", which we submit was not a proper instruction to give the jury in view of the fact that there was no other sufficient evidence as to any other counts charged in the information as to defendants' guilt, and especially as to counts III and IV upon behalf of defendants below, Landfield and Oliver.

By said instruction, the jury was also instructed that certain witnesses had testified that Oliver co-operated or collaborated and knew what was going on, and contributed to it and aided and abetted it "in so far as he did", that they might find the defendant, Oliver, guilty, when there was no testimony in the record to show that Oliver co-operated, collaborated or knew what was going on, or no facts from which said inference could be indulged in.

Said instruction is also erroneous in point of law in that the jury were instructed that if he, the defendant Landfield, aided, abetted or co-operated or made it possible for the liquor to be *purchased* (italics ours) that he would be just as responsible as if he had sold the liquor and taken the money.

XIII.

That the Trial Court Erred in Its Charge to the Jury, in That It Gave to the Jury the Following Instruction Which Is Not a Correct Statement of the Law; To-wit:

"There has been some slight suggestion—I say slight suggestion, it was rather lengthily elaborated upon, to

the effect that you don't know whether the stuff in these bottles contains more than one-half of one per cent of alcohol by volume. I think it hardly worth the time of the court to elaborate upon that. It could easily be true that somebody might have difficulty in saying what near beer or beer or some other similar substance might or might not contain one-half of one per cent or more of alcohol, or thereabouts, but it would hardly seem that anybody with any experience at all, anybody that was not born day before yesterday, could not tell what gin and whisky is. That is what the testimony is, that gin and whisky was purchased. So, gentlemen, don't let your minds be diverted by any unsubstantial, specious argument like that. It is for you to say what the facts are, what the proof is, and you cannot convict the defendants if you do not believe they sold these things containing more than one-half of one per cent of alcohol. If they did sell it, it would be hardly reasonable to conclude that they were selling something that contained less than one-half of one per cent of alcohol; it would hardly be reasonable to believe that an article of that kind was sold for $5.00 and $7.00 a bottle, if you find it was sold for that, so the whole thing, after you simmer it down, depends upon whether you believe these officers or agents or the defendants. The defendant Landfield says that the officers—the testimony given by the officers was an out and out falsehood, plain perjury. That is the case if his story is to be accepted that he didn't know of the sales being made and didn't participate in the sales. Then these officers have come here and deliberately perjured themselves, because there cannot be any question under the circumstances but that they went there on these occasions and that they there met and talked with the defendant.

No doubt about that. It is hardly a case of mistaken identity or mistaken location. So it is just a question of what you are going to conclude. Are you going to conclude that these officers have come here and deliberately perjured themselves, or are you going to conclude that the defendant, for the purpose of removing the consequences of his own wrong doing, if he did do wrong, has testified falsely in order to escape the consequences. Both of them cannot be telling the truth. You have to determine one way or the other as to where the truth lies. You have to come to a conclusion that will be fair under all of the circumstances, free from passion, free from prejudice, giving the thing the calm, deliberate, careful and close consideration that it requires at your hands, and that it is your duty to give it, remembering that if you have a reasonable doubt of the guilt of the defendants, of course you should acquit them, but if you believe beyond a reasonable doubt that they have conducted themselves as alleged, either of them, it is your plain duty to convict them. Any exceptions to the charge?" [Tr. of Record, p. 85.]

Said instruction is erroneous in that it instructed the jury that without any evidence as to what the percentage of the liquid in said bottles was, they could find said defendants below guilty. Said instruction is also erroneous in that the jury was instructed that the defendants were guilty, and had testified falsely, or that they would have to arrive at the conclusion that the government officers came into court and deliberately perjured themselves. There were other conclusions which the jury might have reached consistent with the innocence of the defendants, and also with

the fact that the government witnesses might have been mistaken or some other conclusion not admitting that they had deliberately committed perjury.

The defendants then and there excepted to said instructions heretofore given as follows:

"Mr. Williams: On behalf of the defendants, I desire to note an exception to Your Honor's charge, and the whole thereof, and in particular to the charge as to the court's duty in commenting on the evidence; also I desire to note an exception to Your Honor's charge as to the impeachment of witnesses; I also desire to note an exception to Your Honor's charge on the interest of the defendant Landfield. I also desire to note an exception to Your Honor's charge and comment on principal and accessory, aider and abetter. I also desire to note an exception as to the defendant Oliver. I also desire to note an exception to the instruction and comment on the possession of the liquor. I also desire to note an exception to the comment and instruction as to the alcoholic content of the alleged liquor. I also desire to note an exception to the comment and instruction as to the testimony of the Government officers. I also desire on behalf of the defendants to note an exception to the failure of the court to give the instructions requested by the defendants." [Tr. of Record, p. 88.]

In passing, we ask the court to notice the plain error not specifically assigned, to wit: Count fourth in the information, which is to the effect "That on or about the 29th day of August, A. D. 19—, the defendants below had possession of intoxicating liquor." No amendment was made or offered to the information, and it is the contention of the plaintiffs in error that

the information does not state an offense punishable under the laws of the United States, in that the date in question might have been previous to the going into effect or enactment of the National Prohibition Law; and by the same token, that the Twentieth Century is not over, and that no intendments as to the continuation of the National Prohibition Law throughout the Twentieth Century can be indulged in.

> Where an information fails to state an offense punishable under the laws of the United States, and the question was not presented to the trial court, nevertheless it follows, that a sentence cannot be imposed upon a verdict of guilty as charged in the information or indictment, if the information or indictment does not state an offense punishable under the laws of the United States.
>
> Sonnenberg v. U. S., 264 Fed. 327;
>
> Remus v. U. S., 291 Fed. 513.

In conclusion, it is respectfully submitted that for the errors herein set forth, the judgment of the Honorable Court below, as to each of the plaintiffs in error herein, be reversed.

Respectfully submitted,

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Attorneys for Plaintiffs in Error.

No. 4575.

IN THE

United States
Circuit Court of Appeals,

FOR THE NINTH CIRCUIT.

Herman Landfield and J. W. Oliver,
Plaintiffs in Error,
vs.
The United States of America,
Defendant in Error.

BRIEF OF DEFENDANT IN ERROR.

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BRIEF OF DEFENDANT IN ERROR.

Statement of the Case.

The instant case is brought before this Honorable Court upon a writ of error from the United States District Court for the Southern District of California, Southern Division, by the plaintiffs in error, Herman Landfield and J. W. Oliver, the defendants below, hereinafter referred to as defendants.

An information in five counts was filed in the United States District Court hereinafter mentioned on the 17th day of October, 1924, charging the defendants

with violations of the National Prohibition Act. Counts one and two charged both defendants with unlawful sales of intoxicating liquor on the 28th and 30th days of July, 1924, respectively. The jury found the defendant Herman Landfield guilty as charged in both counts, and the defendant Oliver not guilty as charged in both counts. The court sentenced defendant Landfield to serve six months in the Orange county jail on each count, both sentences to run concurrently with each other and with that imposed on count five, which is hereinafter referred to.

Pursuant to the court's instructions, the court found both defendants not guilty as to the third count and no mention will be made herein as to said count.

Count four charged both defendants with the unlawful possession of three quarts and one pint of intoxicating liquor on or about the 29th day of August, 19...(the proof established the date as August 29, 1924); the jury found both defendants guilty as charged; the court imposed a fine of $1.00 upon each of said defendants on the fourth count.

Count five charged both defendants with maintaining a common nuisance on or about August 29, 1925, with violation of the National Prohibition Act; the jury found both defendants guilty as charged; and the court sentenced the defendant Landfield to one year in the Orange county jail, said sentence to run concurrently with that imposed on the first and second counts, and to pay a fine of $1000.00 and sentenced the defendant Oliver to six months in the Orange county jail on the fifth count.

The defendants assign thirteen specifications of error to the judgment of and proceedings had in the lower court. For the sake of convenience, for the purpose of expediting the consideration of its reply brief and to more clearly present its position, the defendant in error will treat each defendant and his specifications of error separately, and for the reason that most of the specifications of error relate to Landfield, the opening pages of this brief will be devoted to the defendant Landfield and his specifications of error which will be considered in the order in which they appear in his opening brief.

1.

The Verdict of the Jury Finding the Defendant Landfield Guilty as Charged in Counts One, Two, Four and Five of the Information and the Judgment of the Court Thereupon Were According to Law and Supported by the Evidence.

Defendant Landfield contends that each and every finding of the jury as against him was contrary to law and that the evidence was not sufficient to support the jury's verdict.

Each count of the information on which a verdict of guilty was returned against defendant Landfield will be discussed in the chronological order in which it appears in the information, and it is urged at the outset that the verdict of the jury is according to law and amply supported by the evidence.

I. The first count of the information charges the defendant Landfield with the unlawful sale of one bottle of intoxicating liquor to I. H. Corv, for $5.00, on the 28th day of July, 1924.

The said Cory, at the trial, testified that he was a federal prohibition agent; that he visited the Glendale Tavern on the 28th day of July, 1924, in company with his wife and Prohibition Agent Paul Hooke; that upon being seated at a table, he asked for the proprietor and in response to that request the defendant Landfield appeared [Tr. pp. 37-38]; that Landfield asked him what he wanted; that Cory answered, "Well, give us some gin fizzes." He (Landfield) said, "*I* don't serve any mixed up drinks at the table, but *I* will get you the makings." Cory further testified:

"So I went across the dance floor and went into a small room on the left hand side of the dance hall * * * and was gone a couple of minutes, then he came back and beckoned me from the middle of the dance hall. I then got up and walked over to him and he took me into this room. * * * and introduced me to Mr. Ellis. Mr. Ellis said, 'Oh, that is the man that wanted the gin,' and he gave me a White Rock bottle * * * and Mr. Ellis said, 'Here is the gin, here is the way *we* serve it.' I gave Mr. Ellis $5.00 * * *. Landfield did not actually take the money but he was there." [Tr. pp. 39-40.]

Agent Cory, on cross-examination, stated that on the 29th day of August, 1925, upon arresting Landfield, asked him where Ellis was. Landfield replied that he was not *working* there any more. [Tr. p. 51.]

The witness further testified that he drank two drinks out of the bottle; that he knew gin when he tasted it and that it contained more than one-half of one per cent of alcohol by volume. [Tr. p. 41.]

Mrs. Cory testified that she went to the Glendale Tavern on the evening of July 28, 1924, in company with Prohibition Agents Cory and Paul Hooke, and that she saw Landfield there; that Landfield told them *he* could not serve any drinks at the table but it was customary to get the bottle and to serve lemon juice and White Rock water in bottles, and that we could mix our drinks at the table; that he would see that we got a bottle of gin. Mr. Landfield left the table and very soon he came back and motioned to come out. When Mr. Cory returned he had the gin. [Tr. p. 53.]

Landfield took the stand in his defense and testified that he had been in charge of the Tavern for two days prior to July 28, 1924, and that he had not sold any liquor to Cory nor to anyone else. [Tr. pp. 64-69.]

So it is uncontradicted that the defendant Landfield on the 28th day of July, 1924, was the manager and in charge of the Glendale Tavern. He appeared when the proprietor was called and admitted he was in charge. It is contended by counsel that Landfield merely assisted the government agent in making the purchases, but it is respectfully urged that the evidence conclusively shows and was more than ample to justify the jury in finding that Landfield was guilty of making the sale charged in count one of the information.

"A man may, under certain circumstances, do a criminal act through the direct agency of another and the one who stands by and knowingly aids, counsels and abets the doing of a criminal act, becomes liable as principal."

Dukich v. U. S. (C. C. A., 9th Cir.), 296 Fed. 691.

See, also:

Heitler v. U. S. (C. C. A., 7th Cir.), 280 Fed. 703, 705;

Wigington v. U. S. (C. C. A., 4th Cir.), 296 Fed. 125.

There was evidence before the jury that Landfield was the manager of the cafe; that he described the manner in which the establishment served intoxicating drinks; that he would see that the essential ingredients, including gin, were obtained; that in his presence, in an ante-room in the establishment, a man named Ellis (who Landfield admitted worked there) sold the bottle of gin and made the statement, "This is the way *we* serve it." This evidene is more conclusive than that required to convict a defendant of sale done in the Dukich, Heitler and Wigington cases, *supra*.

II. The second count of the information charges the defendant Landfield with having unlawfully sold a bottle of intoxicating liquor on the 30th day of July, 1924, at the Glendale Tavern.

Prohibition Agent Ahlin testified that he was introduced to defendant Landfield at the Glendale Tavern on the 30th day of July, 1924. Upon being seated

with Agent Cory, Mrs. Cory and Agent Hooke at a table in the Glendale Tavern, Landfield was introduced as the proprietor. [Tr. p. 58.]

"Landfield called Mr. Ellis over. Mr. Landfield was present at the conversation between Mr. Ellis and myself. I told Mr. Landfield I wanted Scotch and Landfield said, 'Yes, give it to me.'" [Tr. p. 62.]

A short time after Ellis beckoned to the witness to come over to the little room off the dance floor and there sold him a bottle of Scotch whiskey for $5.00.

The circumstances of this sale are almost identical surrounding the one on the 28th day of July, and it is therefore respectfully submitted that the jury was justified in finding the defendant Landfield guilty of making the sale charged in count two of the information, the facts and circumstances falling within the rule in the Dukich, Heitler and Wigington cases, *supra*.

The fourth count of the information charges the defendant Landfield with the unlawful possession of three quarts and one pint of intoxicating liquor on the 29th day of August, 19...(the proof establishing the date as August 29, 1924). This liquor was seized at the Glendale Tavern. Landfield was present at the time in a managerial or proprietary capacity and had been such since two days before the 28th day of July, 1924. In view of all the facts and circumstances, the manner in which gin had been sold by the establishment on the 28th and 30th days of July, 1924, and the nature of the establishment, it is respectfully submitted that the evidence established beyond a reasonable doubt

that the liquor was unlawfully possessed and that the defendant Landfield knowingly aided and counseled in the unlawful possession thereof and the verdict of the jury in finding the defendant guilty of illegal possession was supported by the evidence.

IV. The defendant Landfield contends that there was not sufficient evidence to warrant the jury in finding him guilty of maintaining a nuisance, but, it will be noted, does not seriously urge this point; counsel merely cites the case of Muncy v. U. S., 289 Fed. 780, in support of said contention, which case is easily and readily distinguished from the case at bar. In the Muncy case, *supra,* the only evidence was one isolated case of the sale of one pint of liquor by a woman of the laboring class, made in her apartment. In the instant case, we have two sales, July 28, 1924, and July 30, 1924, made in a tavern or cafe by the proprietor or manager thereof and on the 29th day of August find the defendant in charge of the premises when a quart of intoxicating liquor was seized on the premises from guests on the place, raising the reasonable and logical inference, in view of the circumstances surrounding the sales to the prohibition agents, that the guests acquired the liquor on the 29th day of August in the same manner as did the prohibition agents on the previous occasions.

It has been recently held that where a defendant owned a building and knew that intoxicating liquor was being illegally kept and sold on the premises, the owner was guilty of maintaining a nuisance. (Dallas

v. U. S. (C. C. A., 8th Cir.), 4 Fed. (2nd) 201.) Here the defendant Landfield, though not the owner, but the manager, not only knew that intoxicating liquor was kept for sale, and sold, but actively engaged in the sale thereof himself. It is earnestly contended and urged that the evidence produced at the trial was ample upon which to base a verdict of guilty of nuisance as to the defendant Landfield.

2.

It is not seriously contended by the Government that the evidence was such to convict the defendant Oliver of possession, but it is urged that there was sufficient evidence to convict him of nuisance. It was shown that he was present on the 28th day of July when a sale of intoxicating liquor was made, and on the 29th day of August when the place was raided, acting in the capacity of a waiter, and that during the month of October, Prohibition Agent Ahlin purchased liquor from the defendant Oliver at the Glendale Tavern.

3.

It is contended in defendant's brief that the court erred in admitting hearsay evidence at the sale of intoxicating liquor on the 30th day of July, 1924, on the ground that the sale was not made in the presence of either of the defendants. It will be remembered that the defendant Oliver was acquitted as to this count, and therefore the contention is only applicable to the defendant Landfield. This evidence was with relation to the second sale on July 30th, 1924. The

prohibition agents on this occasion called for Landfield and asked him to sell them a bottle of Scotch whiskey. Landfield then called Mr. Ellis over and told Ellis to sell it to them. [Tr. p. 62.] The evidence also shows that the man Ellis was employed or working at the Glendale Tavern, as was hereinafter indicated. It is too well established to need citation that the acts of an agent within the scope of his authority are not hearsay as to his principal. However, in the case of West v. U. S. (C. C. A., 9th Cir.), 2 Fed. (2nd) 201-202, a case involving the question of sales of intoxicating liquor, made by an employee outside the presence of the principal or employer, it was held not to be hearsay as to the principal or employer.

4.

Defendants assign as error the introduction of testimony of the sale by Oliver to Agent Ahlin in October, on the ground that it was subsequent to the date named in the information charging the defendants with nuisance. The court admitted the evidence only in support of the nuisance count, and it is respectfully submitted that it is just as reasonable and competent to admit evidence tending to establish a nuisance *after* the time fixed in the information, as it is prior to the time fixed in the information.

Assuming for the sake of argument that this testimony was erroneously admitted (which we do not concede, however), it was not prejudicial to the defendant Landfield, for the reason that he was not connected with the sale and therefore it is not reasonable to in-

dulge in the inference that it was considered by the jury in its deliberations concerning his guilt or innocence, and for the further reason that it was harmless as to him, but for the principal reason that there was sufficient evidence before the jury without this testimony to convince the jury beyond reasonable doubt that he was guilty as charged in counts 1, 2, 5 and 6.

5.

Points 5 and 6 of defendants' brief that the trial court erred in not directing a verdict of not guilty as to both defendants, presents the same question as was presented in points 1 and 2 of defendants' brief and, as has heretofore been proved, points 1 and 2 of defendants' brief were not well taken, points 5 and 6 must also follow.

6.

Defendants assign as error the interrogation of defendant Landfield by the court. It is apparent, from an examination of the questions propounded to defendant Landfield by the court, that he could not possibly be prejudiced thereby, and it is respectfully submitted that the assignment, to say the least, is somewhat visionary.

7.

Defendants assign as error that no proper foundation was laid for the introduction of the following evidence:

I. The bottle of gin purchased on July 28, 1924;

II. The bottle of Scotch whiskey purchased on July 30, 1924;

III. The two bottles of gin and one bottle of Scotch whiskey on August 29, 1924.

Each prohibition agent in testifying as to the contents of the bottle testified that he knew either gin or whiskey when he tasted of it.

> "The statute does not require that the illegal contents of bottles be proved by chemical analysis."
>
> Smith v. U. S. (C. C. A., 4th Cir.), 2 Fed. (2nd) 715-716;
>
> Singer v. U. S. (C. C. A., 3rd Cir.), 278 Fed. 415, 418 (certiorari denied 42 Sup. Ct. 272).

The evidence shows that the test of each bottle was made immediately after the purchase or seizure thereof, and manifestly the issue is whether or not the bottle contained beverages pronounced to be unlawful by the state at the time illegal transactions took place. The evidence that the contents thereof were such as are prohibited by the statute at the time of the transactions is uncontradicted.

The argument of counsel for defendants that it must be shown that the contents of the bottles was in the same condition at the time of the trial that it was at the time of the sale or seizure thereof, is untenable, especially in view of the fact that the liquor was tested immediately upon coming into the hands of the agents. A failure on the part of the Govern-

ment to lay the foundation urged by the counsel for defendants, merely goes to the weight and not to the admissibility of the evidence. Counsel for defendant had the right, but did not avail himself thereof, to examine the witnesses on *voire dire,* and also to cross-examine the witnesses.

It is therefore respectfully submitted that the evidence was properly admitted and the weight to be given such testimony was one for the jury to determine.

8.

Counsel for defendants contend that the trial court erred in permitting witnesses to testify as to what occurred during a raid of the Glendale Tavern, and cite in support thereof excerpts from the testimony of prohibition agent I. H. Cory. Upon reading the entire testimony of agent Cory, concerning this raid, however, it clearly appears that no error was committed by the court. [Tr. pp. 45 to 51.]

9.

The contention of counsel and defendant that there was no proper foundation laid for the introduction of the two bottles of gin and one bottle of whiskey, seized on the 29th day of August, 1924, has heretofore been considered.

10.

The alleged errors assigned to the instructions of the court are without foundation when the entire charge of the court is considered. As to the alleged

error cited in paragraph 12 of defendants' brief, the attention of this honorable court is respectfully directed to page 74 of the transcript, wherein the trial court charged the jury that they were not bound by any expression of the opinion of the court with respect to the facts of the case. This is also true with respect to error alleged in paragraph 13 of defendants' brief.

Considering the instructions of the trial court to the jury as a whole, it is respectfully contended that no prejudicial error was committed.

It is respectfully submitted that the defendants were accorded a fair and impartial trial; that no prejudicial error was committed during the course thereof, and that the verdict of the jury and the judgment of the court were supported by the evidence and were according to law and should be affirmed.

Respectfully submitted,

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(Italics are ours.)